

**THE CONSTITUTIONALITY OF EMPLOYERS' INVESTIGATIVE
PROCEDURES AND DISCIPLINARY HEARING PROCESSES WITH
SPECIFIC REFERENCE TO DISMISSAL OF EMPLOYEES ON THE
BASIS OF CRIMINAL MISCONDUCTS IN SOUTH AFRICA**

by

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Declaration

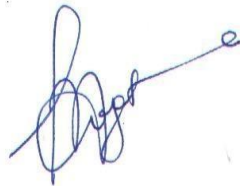
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I declare that the above thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



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KEY TERMS DESCRIBING THE TOPIC OF THESIS

Title of thesis:

THE CONSTITUTIONALITY OF EMPLOYERS' INVESTIGATIVE PROCEDURES AND DISCIPLINARY HEARING PROCESSES WITH SPECIFIC REFERENCE TO DISMISSAL OF EMPLOYEES ON THE BASIS OF CRIMINAL MISCONDUCTS IN SOUTH AFRICA

KEY TERMS:

Fair procedure; Fair reasons for dismissal; Unfair dismissal; Unfair labour practice; Employee criminal suspect; Dishonesty; Criminal misconduct; Fair dismissal; Discipline; Disciplinary hearing; Employer criminal investigations; Constitutional fairness; Section 23 of the Constitution; Chapter VIII of the Labour Relations Act 66 of 1995; Flexibility; Proportionality; Section 35 of the Constitution; Right against self-incrimination

ABSTRACT

This Doctoral thesis entitled the Constitutionality of Employers' Investigative Procedures and Disciplinary Hearing Processes with Specific Reference to Dismissal of Employees on the Basis of Criminal Misconducts in South Africa, focusses on individual labour law principles of fair labour practices entrenched in section 23(1) of the Constitution. The thesis deals with fairness in situation where an employee who is suspected of committing a criminal act is investigated and subsequently goes through a disciplinary hearing for dismissal. It determines the extent to which an employee's criminal guilt is decided before dismissal. As such, the thesis is based upon South African judicial interpretation of the right to fair dismissal. In the process the thesis examines the application of principles informing the employer's duty to provide fair reason concerning the dismissal of employees criminal suspects. In examining if employers observe constitutional transformative objective when conducting criminal investigations and disciplinary hearings - the thesis reviews the extent to which the employer respects constitutional rationales of equity based on the principles of natural justice. These natural justice principles are the basis upon which section 23(1) fairness is founded. Section 23 (1) is implemented through the LRA provisions. The thesis then concludes that, only one principle of natural justice - *audi alteram partem* is respected within employer flexibility-based fairness while the other principle - *nemo iudex in propria sua causa* is ignored. It is this denial that causes serious procedural challenges in the quest for equity intended in section 23(1) fair labour practices. It is upon these foundational equity concerns that this thesis opposes the flexibility in employer's criminal investigations and disciplinary hearing processes entrenched in item 4 (1) of Schedule 8 of the LRA fair procedure for dismissal of employees suspected of criminal acts. The thesis interlinks labour law and criminal law to advocate for the missing constitutionally justiciable fairness for employees who have committed criminal misconducts. It argues that the current judicial interpretation of

labour law fairness is based upon the principle of flexibility underlying dismissals, asserting that fairness based on flexibility breeds informal procedural processes which exempt employers from observing crucial constitutional fairness principles expressed through proportionality-based prescripts. The thesis concludes that the practice of including the right against self-incrimination in employment law, done in other common law countries be introduced into the South African labour law through section 39 of the Constitution so that the identified procedural challenges are regulated.

LIST OF SELECTED ACRONYMS

AD	Appellate Division
AMR	Academy of Management Review
BCEA	Basic Conditions of Employment Act 75 of 1997
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
CBR	Centre for Business Research, University of Cambridge
CC	The Constitutional Court of South Africa
CCAWUSA	Commercial Catering & Allied Workers Union of SA
CCMA	Commission for Conciliation Mediation and Arbitration
CLJ	Cambridge Law Journal
CM	Criminal Misconducts (Misconducts through commission of crime)
CPA	The South African Criminal Procedure Act 51 of 1977
CPD	Cape Provincial Division
DLJ	Duke Law Journal
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
ECTHR	European Court of Human Rights
EHRR	European Human Rights Reports
ERA	The New Zealand Employment Relations Act of 2000
ESRC	Economic and Social Research Council
EU	European Union
FILJ	Fordham International Law Journal
FSCA	Financial Sector Conduct Authority
GEO. L.J.	The Georgetown Law Journal
HARV LR	Harvard Law Review
IC	Industrial Court
ICCPR	International Covenant on Civil and Political Rights

ICLQR	International and Comparative Law Quarterly Review
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IRLR	Industrial Relations Law Reports
JCLC	Journal of Criminal Law and Criminology
KZP	The High Court of KwaZulu Natal Province
LAC	Labour Appeal Court
LEAA	South African Law of Evidence Amendment Act 45 of 1988
LRA	South African Labour Relations Act 66 of 1995
MAJ	Managerial Auditing Journal
MERCLJ	Mercantile Law Journal
NEHAWU	National Education Health and Allied Workers Union
NZ	The New Zealand
NZBORA	The New Zealand Bill of Rights Act of 1990
PAJA	The Promotion of Administrative Justice Act
SA	The Republic of South Africa
SA MERC LJ	South African Mercantile Law Journal
SABC	South African Broadcasting Council
SACCAWU	South Africa Commercial, Catering and Allied Workers Union
SACJ	South African Journal of Criminal Justice
SACR	South African Criminal Law Reports
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPS	South African Police Services
SCA	Supreme Court of Appeal
SEER	South-East Europe Review for Labour and Social Affairs
TPD	Transvaal Provincial Division
TSAR	The Journal of South African Law
UK	The United Kingdom
USA	United States of America
ZASCA	South Africa Supreme Court of Appeal

SELECTED CONCEPTS

Criminal misconducts: - The term *criminal misconducts* is a term devised in this thesis to refer to criminal acts of dishonesty committed by employees within or without the employer premises and in turn having negative impacts on their employment relationship with their employer.

South African Parliamentary Supremacy: - Parliamentary sovereignty (also called parliamentary supremacy or legislative supremacy) is a concept in the constitutional law of some parliamentary democracies. In South Africa during Common law era (before the Constitution of South Africa, 1996,) there was no rule of law, the legislative body which is the parliament had absolute sovereignty and it was supreme over all other government institutions, including executive or judicial bodies. The parliament repealed the common law through its legislative injunctions and insisted on positivism to safeguard its laws against the common law judicial interpretation. The Judiciary due to its inferiority was prevented from rationalising the law or insisting on justiciability of the law. South African Parliamentary System was therefore an established legal order within the common law system. Hence its reference to as the common law era or order as opposed to the constitutional law era.

Constitutional transformative principles: - is the term implying entrenchments of the constitution as a transformative tool and aimed at a transformative interpretation. Such an interpretation is a human rights-based interpretation.

Wide constitutional transformative fairness perspective: - is a concept of fairness which aligns with the human rights based constitutional objective of the South African Constitution. It implies fairness that observes all constitutional fairness prescripts (sections). All legislation that was passed

to operationalise constitutional entrenchments (sections) is thus referred to as constitutional transformative legislation. In effect all legislation in South Africa post constitution is subjected to the transformative objective of the constitution.

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Chapter One

General Introduction

1 Introduction

In South African labour law, it is the employer who oversees the execution of the employment contract.¹ The obvious understanding is that the private contract of employment is such that the employer is at the top while the employee is at the foot.² Their roles are different, particularly within an employment relationship, the employee is the submissive partner. The employer determines whom to employ for his own benefit as well as also determining the terms of employment depending on the objectives of the business. The source of this circumstance is the foundations of South African labour law. Adopted from the commonwealth system of common law, South African labour law has remnants of the Master and Servant connotation fitted in the progressive model of discipline that South Africa follows.³

From the inception of the contract of employment, the employee would be expected to understand and comply with the terms and conditions of employment set by the employer. In this respect, the employee would owe the employer a duty of respect. In circumstances where the employee falters, the employer is legally mandated to discipline and ultimately dismiss the employee.⁴

The imbalanced nature of the employment contract approximates possible prejudices against the employee who remains at the mercy of the employer.

¹ *Toyota South Africa Motors (Pty) Ltd v Radebe & others* 2000 3 BLLR 243 (LAC) para 43; *Paper, Printing Wood and Allied Workers Union v Pienaar NO and Others* 1993 4 SA 631 (AD) at 638G.

² It is the employer who offers employment and the employee receives employment. See Manamela T 2013 SA MERC LJ 418.

³ On how Master and Servant relationship evolved, read Deakin S *The Contract of Employment* 7. Consider *Addis v Gramophone Co. Ltd.* 1909 (AC) 488, held to be correctly decided in *Johnson v. Unisys Ltd* [2001] IRLR 279.

⁴ Item 4 of the Code.

Historically, during the common law era, before the South African Constitution was adopted, the exercise of the employer's power to investigate criminal misconducts and subsequently hold disciplinary hearings for employee criminal suspects, received much attention from the Industrial Court.⁵

As the Industrial Court reviews jurisdiction, the Industrial Court insisted that the employer observes both common law fairness principles in employer criminal investigations and disciplinary hearings where employees were suspected of criminal misconduct.⁶ First, the employer would be urged to observe the *audi alteram partem* rule and second, the *nemo iudex in propria sua causa*. The principle *nemo iudex in propria sua causa* does not allow persecution of any one upon the particular person's own version.⁷ The intervention of the Industrial Courts could have consistently protected employees from aspects of self-incrimination possible in employer criminal investigations and subsequent hearings for employee criminal suspects. Unfortunately, the Industrial Courts equity pronouncements like other common law courts jurisprudence, were taken with reservations, subject to the common law tradition that adopted South African parliamentary supremacy which opted for the positivists' approach to law.⁸

According to Monyakane,⁹ the Parliamentary Supremacy system was characterised by the principle that led to a positivistic approach in law. She alluded such a state of law to the Aristotelian description of justice which

⁵ See Currie I & De Waal J the *Bill of Rights Handbook* at 501. As well, see van Niekerk A *Acta Juridica* 102, 105 also read Read Cheadle H 2006 *ILJ* 663-703 at 666-667 & 686-687.

⁶ Read the following cases that relate to this history, *Avril Elizabeth Home for the Mentally Handicapped v The Commission for Conciliation, Mediation and Arbitration & Others* 2006 9 BLLR 833 (LC) at 839 and 841 2006 27 *ILJ* 1644 (LC) at 1653 and 1660 (hereinafter *Avril*); *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 *ILJ* 2679 (LC); *Markhams (a Division of Foschini Retail Group (Pty)Ltd v Matji No & others* 2003 11 BLLR 1145 (LC).

⁷ Regarding common law perspectives of fair trial, see Harris D 1967 *ICLQR* 354.

⁸ Van Der Vyver J D *Seven Lectures on Human Rights* 1; Hart H L A 1958 *HARV LR* 596.

⁹ Monyakane MMM *An evaluation of administrative justice in South Africa* 32 (hereinafter Monyakane).

founded the South African common law approach. Aristotelian approach regards law as “what is in accordance with the *nomos* or positive law,”¹⁰ as opposed to what the law ought to be. Monyakane¹¹ observes that positive law underpins the understanding that the law is aligned to authoritative pronouncements and not reasonable pronouncements which considers rational proposals in the light of natural justice principles of fairness.¹² Such positivist understanding could therefore not be interpreted in light of extraneous premise, moral, metaphysical or otherwise. Such an alignment to authoritative pronouncements even when negating natural law encompassing natural justice was justifiable enough in accord to positive law. That such alignment was inherently and invariably inimical to the protection of human rights was of no consequence.¹³ The positivist approach survived in South Africa for a long time¹⁴ only to be replaced by the constitutional Bill of Rights entrenching human rights approach to form the basis of law in the current times.¹⁵

Prior to the human rights approach, the parliament easily legislated against the decisions of the common law courts, hence the inconsistency of the common law courts equity jurisprudence, including the Industrial Court.¹⁶ The positivist approach to law mandated uncontrolled flexibility for exercise of employer’s powers to carry out criminal investigations and subsequent

¹⁰ Monyakane above note 9.

¹¹ Monyakane above note 9.

¹² Van Der Vyver J D *Seven Lectures on Human Rights*1; Hart H L A 1958 *HARV LR* 596.

¹³ Devenish et al. *Administrative Law* 20.

¹⁴ From the Union of South Africa in 1910 up until the adoption of the interim Constitution in 1993.

¹⁵ Mureinik E 1994 *SAJHR* 31, 32; Klare K 1998 *SAJHR* 146.

¹⁶ Read Taitz J T *Unreasonable Acts of Administrative Authorities* 11 who exposes the position of common law courts justice before the coming into effect of the Constitution. Consider Monyakane above note 9 at 37 where she explained the extent of judicial review during the common law era, in particular read chapter two at part 2 2 4 on the extent of judicial review of administrative action under common law. As well read the following cases *National Transport Commission v Chetty’s Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

persecution of employees suspected to have committed criminal acts against their employers.¹⁷ The hasty nature of employer flexibility-mandated investigations and hearings, led to absurdities that the Industrial Court sought to mitigate.¹⁸ Acting without delay to dismiss the employee suspected of a criminal misconduct, the employers who vouched to dodge the intervention of the Industrial Court, continued with criminal investigation without observing principles of fairness relating to investigation of the crime. Furthermore, employers held dismissal hearings against employees as criminal suspects without observing the principle *nemo iudex in propria sua causa*. During these hearings, employees were subjected to self-incrimination and would give self-incriminating evidence in fear of their loss of employment. Furthermore, employees could claim their privilege against self-incrimination at their own disadvantage of being excluded from the hearing while it proceeds in their absence.¹⁹

The uncertainties in labour law were part of the underlying influences to the adoption of the South African Constitution.²⁰ The Constitution that comprises the Bill of Rights entrenching “various rights [impacting] on the formulation of labour market policy and labour law reform,”²¹ including sections 9(1), 17, 23, 34, and 33 of the Constitution, was embraced with hope for the better. Section 23 of the Constitution entrenches labour rights. Its predecessor is section 27 of the interim constitution. The integral core of these two sections is the same. According to Cheadle, there is insignificant difference in the way labour rights were cast in these two sections.²² It is therefore safe to refer to them as entailing basically the same content.

¹⁷ Cameron E 1986 7 *ILJ* 185 -186.

¹⁸ Per Bulbulia AM, J in *Mahlangu v Cim Deltak, Gallant v Cim Deltak* 1986 7 *ILJ* 346 IC at 357-358. As well, see *Davis v Tip No* 1996 (1) SA 1152 (W) 1157F-G and 1158 G-H.

¹⁹ Grogan J *Dismissal* (2018) 419-420.

²⁰ The Constitution of South Africa, 1996.

²¹ Monyakane above note 9 at 32; Mureinik E 1994 SAJHR 31, 32 Klare K 1998 SAJHR 146.

²² Sections 9(1), 17, 23, 34, and 33 of the Constitution. See Cheadle H 2006 *ILJ* 663-703 at 666.

The standard for the legality of employer's disciplinary mandate for dismissals is found in section 23 (1) of the Constitution. Section 23 (1) entrenches fundamental workers' rights in fair labour practices. Section 23(1) of the Constitution demands that there should be fairness in employer and employee dealings. Among these rights is the right to fair dismissal. Together with section 23(1) of the Constitution, the employer's duty to discipline employees is governed by Chapter VIII of the LRA. On this basis, the LRA is considered to have an ability to facilitate the enjoyment of section 23(1) rights. Chapter VIII of the LRA explains in detail the specifics of the investigative procedures and dismissal processes.²³ The rationale for the constitutional entrenchment of the rights to fair labour practices was the requirement to maintain the common law Industrial Court concern for equity in employment relations.²⁴

From this perspective, section 23(1), like all constitutional entrenchments, was purposed to develop the law from restricted positivists perspectives to a rights-based perspective.²⁵ Section 23(1) affords individuals the right to fair labour practices. The right to fair labour practices sustained from the era of Industrial Court equity jurisprudence to the current constitutional era. Within this right is the individual labour law principles encompassing dismissal.²⁶

Individual labour law is part of labour law that expresses the relationship between the employer and the employee. At the inception of this branch of law, established in 1979, the equity jurisdiction of the

²³ Chapter VIII read with Schedule 8, in particular Item 4.

²⁴ per Bulbulia AM J, in *Mahlangu v Cim Deltak*, *Gallant v Cim Deltak* 1986 7 ILJ 346 IC at 357-358. As well, see *Davis v Tip No* 1996 1 SA 1152 (W) 1157F-G and 1158 G-H. Applied from labour law perspective in Grogan J *Workplace Law* (2017) 256; From a civil procedure perspective in Cilliers A C, Herbstain J, Loots C; Nel HC *The civil practice* at page 757 and from a human rights perspective in Currie I & De Waal J *The Bill of Rights Handbook* at 745.

²⁵ Mureinik E 1994 SAJHR 31, 32, Klare K 1998 SAJHR 146.

²⁶ Read section 23(1) of the Constitution together with Chapter VIII of the LRA, in sections 185;186 and 188 with Schedule 8: Code of Good Practice: Dismissal in Items 2;3;4(1) and 7.

Industrial Court insisted on fairness based on principles of natural justice.²⁷ The Industrial Court pronouncements on equity, amongst others, insisted on the enforcement of common law principles of natural justice. Through these pronouncements, the concept of unfair labour practice was refined. It is submitted that the evolution of this concept through these equity pronouncements bears two contours: - the common law era as a fight against the positivist perspective and the constitutional law era as part of human rights-based transformational perspective of fair labour practice.

At the inception of the South African Constitution, the drafters were mindful of the relevant Industrial Court pronouncements on fair labour practice. As a result, they introduced the right to fair labour practices within the South African Constitution Bill of Rights.²⁸ It is upon this basis that it is argued in this thesis, that fair labour practices entailing the right to fair dismissal are founded on equity principles of fairness.

The right to fair labour practices entrenched in section 23(1) of the Constitution addresses principal workers' rights. Among these rights is the right to fair dismissal. To operationalise Section 23(1) objectives, the LRA²⁹ was enacted.³⁰

Due to the equity background to the formation of section 23 (1), it is argued that the LRA, while seeking to express a section 23(1) mandate, cannot be interpreted without constitutional objectives informing equity. These are in the Preamble along with section 1, 8,9, 23(1), 33, 35, 39 and 195 of the Constitution. The interrelationship of these provisions with section 23(1) cannot be overemphasised. It is based on the fundamentals of constitutional interpretation of the Bill of Rights.

The general understanding about the true intention of the developments based on the Industrial Court equity principles ought to be that, equity could be adopted to protect employees from unfair labour

²⁷ Currie I & De Waal J The *Bill of Rights Handbook* at 501.

²⁸ Currie I & De Waal J The *Bill of Rights Handbook* at 501.

²⁹ Act 66 of 1995 as amended.

³⁰ Section 27 of the Interim Constitution.

practices similar to those that prevailed in the common law era.³¹ As mentioned before, the employer exercised uncontrolled powers over employees as there was no regard for individual rights. Regarding the employer's criminal investigative and disciplinary hearing powers, employers could investigate matters of a criminal law nature in order to dismiss employee criminal suspects within their discretion. They would use flexibility-based discretion which allowed them to not observe proportionality-based principles even though such principles were meant to promote natural justice principles, intended at protecting individual rights. Such discretions were contrary to the principles underlying the social contract principles of individual condemnation.

Within the constitutional perspective that now recognises equity-based principles of natural justice and entrenched equity within the Bill of Rights, the operationalisation of the new labour law ought to observe constitutionalised common law equity.

Such equity is entrenched in the Bill of Rights. This is especially true in respect of section 35, which entrenches criminal suspects' rights which in effect, regulate equity within the common law social contract principles of condemnation. In the current era of constitutional authority there ought to be obvious inter relationships of constitutional fairness principles in sections 23(1) and 35 of the Constitution when dealing with the condemnation of employee criminal suspects.

Based on these developments, jurisprudential interpretation of LRA provisions, relating to the dismissal of employee criminal suspects, must observe section 35 fairness principles. Such an interpretation would accord to what section 23(1) read with sections 1, 8, 9, 33, 39, and 195 opts for in alleviating employer–employee inequalities.

³¹ In order to get the depth of what happened before the advent of constitutionalism read, du Toit D 2008 SALJ 98 SALJ 101; van Niekerk A *Acta Juridica* 102, 105; Currie I & De Waal J *The Bill of Rights Handbook* at 499; also read, Cameron E, Cheadle H and Thompson C *The New Labour Relations Act*: 144-145.

It is argued that if sections 23(1) and 35 of the Constitution are read together, the equity background to section 23(1) can be maintained in instances where there are employer investigations of criminal misconducts. Equity could apply with equal force where disciplinary hearings for dismissals of employees who have committed criminal misconducts, observe fairness mandated in the Constitution from a wide constitutional fairness perspective. The broad constitutional perspective is anticipated in section 23(1) read with sections 1, 8, 9, 33,35, 39, and 195. section 23(1) provisions and must be understood within the parameters of the Bill of Rights.³²

Within this understanding, this thesis scrutinises the current measure of equity within item 4(1) of the Code of Good Practice: - Dismissal procedure entailing the employer criminal investigation and dismissals based on employee criminal misconducts. This pursuit is amid concerns, levelled against labour law in general, namely, that even today in the constitutional era, labour law is still rigged with inequalities.³³

The major concern in this work is affected by the obvious resulting inequality due to the nature of the contract of employment. As the term contract suggested, an employer–employee contract relationship exists at the commencement of the contract whether verbal or written. The common law nature of this agreement is such that the employee offers services to the employer while the employer would remunerate the employee. In the meantime, the employer determines the terms of employment while the employee submits to these conditions. The employee remains a weaker party in this type of contract as there is no balance of power between employer and employee. The employer’s discretion as to who to hire and

³² Grogan J *Dismissal* (2018) 213.

³³ Grawitzky R “From Workplace Rights to Constitutional Rights in South Africa” *ILO Century Project Roundtable* November 2013
http://www.ilo.org/wcmsp5/groups/public/---africa/documents/publication/wcms_229509.pdf [accessed March 2016].(Hereinafter, Grawitzky).

under what conditions to dismiss, has proven disadvantageous to the employees as will be discussed later.³⁴

The massive contractual powers that the employer possesses, result in multiple prejudices against employees as shown in chapter four of this thesis. The worst-case scenario is when an employee is suspected of criminal misconduct. In this scenario, the massive hand of the employer hits hard, unless it is mitigated by transparent procedures and processes like those entrenched in section 35 of the Constitution, along with the provisions of the Criminal Procedure Act 51 of 1977 (CPA).

1 1 Background to the Study

The massive powers that the employer has within the employer–employee relationship ought to be mitigated by law. However, it seems that this is not the case in employer criminal investigations and the subsequent disciplinary hearings on employee criminal suspects. Under the South African labour law, the power to investigate crimes allegedly committed by employees and to hold a disciplinary hearing of an employee criminal suspect is vested within the flexible procedures designed by the employer, as opposed to constitutionalised and established criminal investigation procedures. The employer flexible processes are opposed to procedures by the statutorily ensued personnel, like the South African Police Services (SAPS) and the Courts. The SAPS investigate criminal conducts guided by the procedures, provided for in the CPA.

The same happens with the hearing of criminal persecutions brought before courts that follow the defined procedures laid down in the CPA. At the base of SAPS investigatory procedures and court processes, is the entrenched fairness principles in section 35 of the Constitution, including the prohibition from persecution without regard to the principle *nemo iudex in propria sua causa*. Section 35 entrenches the right against self-incrimination.

³⁴ Grawitzky above note 33.

Against these constitutional demands, the employer's powers to investigate employee criminal suspects does not rely on the constitutionalised investigation processes in section 35 of the Constitution along with the CPA. Rather the employer's power to investigate criminal misconducts is governed by labour law, which deals with employer and employee relationships.³⁵ Criminal misconducts discipline is part of individual labour law based only on the positivistic interpretation of section 23(1) of the Constitution along with the provisions of Schedule 8 of the LRA. Employer criminal investigations and subsequent hearings for employee criminal suspects, entails flexibility approach to discipline, as opposed to proportionality-based approaches to discipline, encouraged in section 35 of the Constitution read with the CPA.

As will be illustrated in chapters two, three, and four, there are limitations attached to employer flexibilities. To cement these limitations, the entailed jurisprudence insists that for purposes of consistency, accuracy and effectiveness, labour matters concerning fair dismissals, are to be dealt with before the Labour Court, where experts in labour law are accessible.³⁶ It is settled that the "Labour Court (or the CCMA)³⁷ does not have exclusive jurisdiction over all disputes arising from a dismissal, but only over those in which the fairness of the dismissal is at issue."³⁸ The review of employer criminal investigations and disciplinary hearings, based on criminal misconducts falls within the fairness of dismissal determinations.

The restrictions embedded in this development confine the determination of LRA fair dismissal within restricted labour law boundaries enabling the ignorance of section 35 fairness principles. This approach has negatively affected labour law fairness in that it discourages the extended observance of wide constitutional fairness principles in the Preamble,

³⁵ The South African Labour Relations Act 66 of 1995 (LRA) read with section 23 of Act 108 of 1996 hereinafter, the Constitution of South Africa, 1996.

³⁶ *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA).

³⁷ The Commission for Conciliation, Mediation and Arbitration (CCMA).

³⁸ *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA) para2.; as well read van Eck S 2010 TSAR 1.

sections 1, 8, 9, 23, 35, 39 and 195 of the Constitution. Due to these confinements, employers are often unreasonable in their exercise of power at the demise of employees.³⁹ Be that as it may, they are bailed out from accounting for their unfair decisions by the LRA's restricted approach to the application of the constitutional fairness principle in labour matters.⁴⁰ The fairness principle in matters involving employees who have committed criminal misconducts does not extend to the determination of such employees' rights as criminal suspects, entrenched in section 35 of the Constitution.⁴¹

These restrictions triggered the need to assess the constitutionality of employer's criminal investigative procedures and disciplinary hearing processes regarding employee's dismissal based on criminal misconduct. This is especially true when these procedures are supposed to observe section 23(1), a section within the Bill of Rights entrenching the right to fair labour practices.

Employers who seek to implement section 23(1) and yet ignore the application of employee criminal suspects' rights entrenched in section 35 of the Constitution are against the constitutional mandate of the Bill of Rights. They are against constitutional transformative principles and therefore their discretion is inappropriate. The nature of the treatment of employee criminal suspects within employer discretion under these circumstances, mimics the common law positivist approach, where statutory protection of employee criminal suspects rights were rarely, if ever, in existence.⁴² Under common law, before the Constitution came into effect, fairness in labour matters was lacking due to the legal pursuit for South

³⁹ van Niekerk A 2012 *Acta Juridica* 102, 105.

⁴⁰ This is based on the principle that courts should exercise deference when reviewing employer's decisions.

⁴¹ Grogan J *Dismissal* (2018) 213.

⁴² Mureinik E 1994 *SAJHR* 31, 32.

African parliamentary supremacy aimed at enhancing the positivist approach to the law.⁴³

Within the positivist system, the law of master and servant was over-emphasised against the human rights-based approach, which could have protected individual rights. This practice occurred in defiance of common law natural justice principles of fairness.⁴⁴

Common law fairness principles encompassing the enforcement of both *audi alteram partem*⁴⁵ and *nemo iudex in propria sua causa*⁴⁶ are borne from the idea of *jura naturale*.⁴⁷ Both of these principles of fairness were useful in protecting human rights. According to Monyakane: “[t]he concept of natural justice is linked to the development of the theory of law pertaining to the protection of individual rights.”⁴⁸

In consonance with Monyakane’s explanation, Marshall neatly captures the role of these principles.⁴⁹

*Principles of natural justice are not only a part of natural law but are that part of natural law which relates to the administration of justice. That is to say, the two principles that no man shall be judged in his own cause and that both sides must be heard are so necessary for the fair administration of justice that they have been accepted as fundamental for that purpose.*⁵⁰

⁴³ Grawitzky above note 33. Also read Deakin S *The Contract of Employment* 7 as well as *Addis v Gramophone Co. Ltd.* 1909 (AC) 488, held to be correctly decided in *Johnson v. Unisys Ltd.* [2001] IRLR 279.

⁴⁴ See Grawitzky above note 33. Also read Deakin S *The Contract of Employment* 7. As well as *Addis v Gramophone Co. Ltd.* 1909 (AC) 488, held to be correctly decided in *Johnson v. Unisys Ltd.* [2001] IRLR 279.

⁴⁵ “Hear the other side.”

⁴⁶ “No man shall be judged in his own cause.”

⁴⁷ Natural justice. See, Marshall T *Natural Justice* London 6, where he explains that *jus naturale* or natural law “was originally the Stoic philosophical conception of a universal idea of good conduct upon which all law should be founded and which, some asserted, ought not to be overridden by any other laws however made.”

⁴⁸ Monyakane Above note 9 at 32.

⁴⁹ Marshall T *Natural Justice* London 6.

⁵⁰ Marshall T *Natural Justice* London 6.

The application of these principles has become more important in the administration of justice because they founded the constitutional human rights-based perspective in South Africa. By constitutionally entrenching these principles, South African law is now based on democratic values, social justice, and fundamental human rights.⁵¹

The Constitution demands recognition of these values in every human undertaking, be it of private⁵² or public⁵³ concern. The South African Constitution enshrines human rights in a written document,⁵⁴ entrenches the values of human dignity, equality and freedom,⁵⁵ and expressly provides for constitutional supremacy.⁵⁶ Amongst the sections that emphasise constitutional fairness from a wide perspective, are sections 1,8,9,23, 33, 35 and 195 of the Constitution which constitutionalise the underlying principles of administration of justice ensconced in natural justice principles.⁵⁷ Through these sections, the Constitution redefines exercise of authority across the board, in both private and public dealings.

Contrary to the philosophy which underlies the exercise of authority under the autocratic positivist system, the constitutional exercise of authority in private dealings is circumscribed by the need to satisfy sections 8 and 39 of the Constitution. Section 8 on the application of the Bill of Rights reads:

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

⁵¹ Klare K 1998 *SAJHR* 146, 158.

⁵² Section 8 of the Constitution. *Du Plessis v De Klerk* 1996 3 SA 850 (CC), *Barkhuizen v Napier* 2007 (5) SA 323 (CC) and *NM v Smith* 2007 5 SA 250 (CC).

⁵³ Section 33 of the constitution. *Pharmaceutical Manufacture Association of South Africa In Re: The Ex parte Application of the Republic of South Africa* 2000 2 SA 674 (CC) 49.

⁵⁴ Chapter 2 of the Constitution.

⁵⁵ In section 1(a) of the Constitution. Sections 9, 10 and 12, tabulate the essentials of these values.

⁵⁶ Sections 1(c) and 2.

⁵⁷ Regarding criminal justice section 35 of the Constitution is at the fore.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

In the context of this thesis, section 8 cannot be interpreted without section 39. The latter gives full effect to the former, in the sense that section 39 guides the expression of section 8 mandates. section 39 reads: -

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Both sections 8 and 39 emphasise the need to observe constitutional fairness to attain justification.⁵⁸ According to Mureinik,⁵⁹ the constitutional era breeds “a culture of Justification”⁶⁰ as opposed to the common law era’s culture of authority. Thus, as indicated in sections 8 and 39 in this era, “every exercise of power is expected to be [constitutionally] justified.”⁶¹ Under this system of constitutional justification, it is not possible for the legislature to exclude the principles of natural justice in the way that it could be done in the common law era under the South African parliamentary system. Consequently, the correct interpretation of the purpose of justice⁶² is that, it promotes values⁶³ of human dignity, equality, and freedom.

Aligned to the entrenched constitutional justification requirement is the provision of Article 4 of Convention No. 158⁶⁴ reemphasising the need for observation of the principle of justification within the national laws. Section 39(1)(b) makes the observance of Article 4 provisions mandatory when dealing with dismissals. It is argued that in terms of these provisions, employers’ investigations and subsequent hearing processes ought to not disregard the entrenched section 35 fairness requirement in matters of a criminal law nature. Criminal misconducts are matters of a criminal law nature.

Thus, for purposes of a justiciable and therefore dignified criminal persecutions, section 35 of the Constitution has entrenched the second leg of natural rights, including the right against self-incrimination. These are the essentials of the rights of criminal suspects, including employee criminal suspects. In chapter two, it is explained that section 35 rights, culminate in

⁵⁸ Mureinik E 1994 *SAJHR* 31, 32.

⁵⁹ Mureinik E 1994 *SAJHR* 31, 32.

⁶⁰ Mureinik E 1994 *SAJHR* 31, 32.

⁶¹ Mureinik E 1994 *SAJHR* 31, 32.

⁶² Klare K 1998 *SAJHR* 146, 158.

⁶³ Section 165(2) of the Constitution.

⁶⁴ Article 4(b) of the Termination of Employment Convention, No. 158 of 1982.

the procedure based on proportionality to mitigate the harshness of criminal condemnation. In satisfaction of the constitutional right to equality entrenched in section 9 of the Constitution, section 35 rights, should apply to all criminal suspects without discrimination. The current employer's criminal misconducts investigations and hearings insinuate such discriminations. Against this section 9 of the Constitution reads:

Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9 forms part of the provisions at the centre of the recognition of the constitutional values. Allied with section 9 are the entrenched sections 1, 23, 33, 35 and 195. These sections are applied within constitutional guidelines in sections 8 and 39 of the Constitution. Through sections 8 and 39 provisions, everyone, be it a natural or a juristic person, must recognise

and apply the rights, in the Bill of Rights, in their everyday dealings. These provisions even apply to individual disagreements.⁶⁵

With reference to finding resolutions for acts and omissions of a criminal nature, in section 35, the Constitution entrenched principles of natural justice that are meant for the protection of individual rights. The Constitution makes them central to constitutional criminal justice.⁶⁶

Through this entrenchment, the Constitution demands cautious and discreet approaches to the applications of theories⁶⁷ underlying condemnation and labelling of individuals as perpetrators of actions or omissions classified as crimes.

The employer labelling and condemning an employee suspected of criminal misconduct, as criminal, encroaches on individual rights entrenched in the Bill of Rights.⁶⁸ Criminalised acts and omissions are defined in relevant schedules in the CPA.⁶⁹ The very same crimes listed in Schedules I to III of the CPA constitute criminal misconducts subjected to investigation and disciplinary hearing by the employer.⁷⁰

⁶⁵ Per section 8 (2) of the Constitution. On the explanation on indirect horizontal application of the Bill of Rights see Currie I & De Waal J *The Bill of Rights Handbook* at 50-52.

⁶⁶ Steytler N *Constitutional Criminal Procedure* (1998) at page 3.

⁶⁷ For an understanding of these theories and their application, see for example, Wellford, C Vol 22 (3) *Social Problems* 332-345. See part 2 2 4 1 on the theory of proportionality and its extent of application in criminal misconduct discipline.

⁶⁸ See section 35 of the Constitution entrenching the right to fair trial in criminal matters. Read it with *S v Orrie and Another*, 2005 1 SACR 63(C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56.

⁶⁹ See schedules i–ii of the CPA.

⁷⁰ The LRA, differentiates between minor misconducts and serious misconducts but does not clearly specify types of misconducts for each class. It can be read to be attempting to generalise gross misconducts in section 3(4) which in relevant part reads;

Dismissals for Misconduct

.... Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the

The Constitution, therefore, uses natural justice principles to rationalise the application of laws that criminalise particular acts and omissions, thus affecting individual rights entrenched in the Bill of Rights.

In the constitutional era, neither common law nor South African parliamentary legislation determines the process of dealing with omissions and actions of criminal nature as listed in the CPA. The pedestal law is the Constitution. Integral to the relevant constitutional provisions are the Bill of Rights. The Bill of Rights contain general provisions relevant to dealing with criminal acts specifically listed in the CPA schedules. Steytler⁷¹ similarly opines that:

*The Bill of Rights contains both general provisions which are relevant to criminal procedure, such as the right to dignity, the right to life, the right to freedom and security of persons and the right to privacy, and provisions aimed specifically at criminal justice, namely the right of arrested, detained and accused persons.*⁷²

Even though natural justice principles were available in the common law,⁷³ they were applied differently to the way they are applied in the current constitutional era. The common law and South African parliamentary legislation were determinative in the process of dealing with omissions and actions of criminal nature.

employer, a fellow employee, client or customer and gross insubordination. (added emphasis).

It is explicit in these words that misconducts of a criminal nature are falling under serious misconducts because amongst criminal acts are acts of dishonesty. These include theft, fraud and so on and so forth.

⁷¹ Steytler N *Constitutional Criminal Procedure* (1998) at page 3.

⁷² Steytler N *Constitutional Criminal Procedure* (1998) at page 3. Rights applying to accused persons include rights for suspects. To find clarity, read *S v Orrie and Another*, 2005 1 SACR 63(C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56.

⁷³ See Harris D 1967 *ICLQR* 354.

South African parliamentary system circumstances allowed for the enactment and application of legislation without regard to natural justice principles. Describing this scenario from a constitutional law perspective, Rose Innes writes that, “review power could be excluded by the legislature or restricted in extent by statute” or, “[i]n certain cases, ‘particular’ grounds for review could be of limited application or not applicable at all.”⁷⁴ The law could not therefore on its own in the absence of the Constitution, “become an instrument of reform.”⁷⁵

The employment statutory law was no different. During the common law era, statutory law in general as well as the common law governed labour law aimed at amassing employers’ massive powers and ignored “workers’ fundamental rights.”⁷⁶ The legislature in defiance of natural justice, empowered the employer with statutorily protected powers while the employee had none or few rights under the contract of employment.⁷⁷ To curb this harsh scenario, the workplace ought to be controlled.

There was a need to place limits on “the unbridled common law power of the employer.”⁷⁸ It is submitted that if this was done, individual rights would be considered, and the harsh effects of the law of master and servant as applied then, would be mitigated. Due to the fact that there was no protection of human rights, “the Industrial Court⁷⁹ tried to become the

⁷⁴ Rose Innes *Judicial Review* (1963) 7.

⁷⁵ du Toit D 2008 SALJ 101.

⁷⁶ du Toit D 2008 SALJ 101. As well read Grawitzky above note 33.

⁷⁷ Cameron E, Cheadle H and Thompson C *The New Labour Relations Act*: 6.

⁷⁸ Cameron E, Cheadle H and Thompson C *The New Labour Relations Act*: 6.

⁷⁹ The Industrial Conciliation Amendment Act 94 of 1979 established the Industrial Court. This Court introduced the concept of unfair labour practice. The definition of unfair labour practice was general and therefore specifically inferred fairness to the termination of employment. It did not infer with definite terms any right against an employer and specifically defined as to when employment could be said to have been terminated in circumstances that could be regarded as unfair. see van Niekerk A 2012 *Acta Juridica* 102, 105.

agent of change with the notion of ‘fairness’,⁸⁰ rather than ‘lawfulness’,⁸¹ as the touchstone of its jurisprudence.”⁸² It relied on the wide interpretation of fairness based on the principles of natural justice⁸³ and it “[struck] down unlawful labour practices, including contractual rights and obligations that were found to be ‘unfair.’”⁸⁴

Upon creating the tribunal (the Industrial Court), the statute defined “unfair labour practice”⁸⁵ and granted “ostensibly unrestrained”⁸⁶ powers to the court to declare any unlawful labour practice that “*it considered to be unfair.*”⁸⁷ Due to this relaxed approach, courts were able to protect employees’ rights even at the peril of dismissal. Where criminal misconduct

⁸⁰Monyakane Above note 9 at 11, fn 43 where she wrote that,

*[f]airness prescribes the best way to achieve a certain objective and relates to the underlying values in the undertaking. Procedural fairness then relates to the best way to undertake a decision based on the prescriptions of the law and the circumstances that the decision-maker is facing. Procedural fairness can encompass both rationality and reasonability, although it may not mean that what is rational is fair or what is reasonable is fair.*⁸⁰

Because nothing could measure lawfulness, statutes were enacted today and repealed tomorrow to suit apartheid perspectives. Laws were based on positivists’ perspectives.

This period was characterised by the principle of parliamentary supremacy, which led to a positivistic approach in law. Based on the Aristotelian description of justice as what is in accordance with the nomos or positive law, positivism is underpinned by the belief that law is what the authorities pass as law. As a result, there is no need to regard any extraneous premise, moral, metaphysical or otherwise. Although this approach negates natural law, which encompasses natural justice, and it is “inherently and invariably inimical to the protection of human rights,” it was followed in South Africa for a long time.

Per, Monyakane Above note 9 at 32, footnotes excluded.

⁸² du Toit D 2008 SALJ 101.

⁸³ See the decision in *R v Home Secretary, ex parte Hosenball* 1977 (1) W L R 766 772, which held that “the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done.”

⁸⁴ du Toit D 2008 SALJ 101.

⁸⁵ du Toit D 2008 SALJ 101.

⁸⁶ du Toit D 2008 SALJ 101.

⁸⁷ du Toit D 2008 SALJ 101.

was an issue, the court insisted on investigation akin to that held under criminal procedure.⁸⁸ The courts were able to do so because, in pursuit of the enforcement of fairness principles, they interpreted the concept of “fair dismissal” in a different way. Courts applied the abovementioned common law principle of fairness widely.⁸⁹ They considered the importance of applying both principles of natural justice to enforce fairness in dismissal.⁹⁰ Dismissals based on criminal misconducts were not treated lightly by the common law courts, taking into account the atrocity of dismissal as a punishment on an employee.

To use Harcourt Mark, Hannay Maureen & Lam Helen’s words, dismissal was considered to have “a drastic impact on employee’s livelihood, self-esteem and future career.” It was found to be “a severe punishment, involving, drastic income loss, major stigmatization, and social disconnection.”⁹¹ It is argued that it is on the basis of similar considerations, that courts considered the persecution of employee criminal suspects’ within employer civil processes rather complex.⁹²

Confronted with a criminal misconduct case, in *Mahlangu v Cim Deltak*, *Gallant v Cim Deltak*,⁹³ Bulbulia AM J viewed dealing with the question of criminal misconducts as a ground for dismissal and considered it a confrontation with many challenges. This was especially because even if this is performed within labour law prescripts, “dishonesty ought not be merely suspected but it ought to be proved, although that proof could be

⁸⁸ *Avril* above note 6 at 838 and at 1652. Also see *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA).

⁸⁹ See van Niekerk A 2012 *Acta Juridica* 102, 105.

⁹⁰ *Avril* above note 6 at 838 and at 1652. Also see *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 5 SA 552 (SCA).

⁹¹ Harcourt Mark; Hannay Maureen & Lam Helen 2013 *J Bus Ethics* 115:311–325 at 311 and 313.

⁹² per Bulbulia AM, J in *Mahlangu v Cim Deltak*, *Gallant v Cim Deltak* 1986 7 ILJ 346 IC at 357–358.

⁹³ 1986) 7 ILJ 346 IC at 357–358.

based on a balance of probabilities.”⁹⁴ Levy, arguing from a labour law perspective, observed that:

*Theft is without doubt the most difficult situation that an employer has to deal with. I have said that it is unwise and probably unfair to dismiss an employee without notifying him of the reason. But proof that a man has committed theft is a matter for the criminal courts and not for a unilateral decision by an employer. Inevitably, the employer's decision to fire for theft is based on evidence that would not obtain a conviction in a criminal court. ... If the employer has based his evidence on suspicion, hearsay or security reports and there is no hard evidence, he is not entitled to say that a theft has occurred. He therefore has no justification to dismiss for theft.*⁹⁵

Levy's observation cements what was held in the case of *Mahlangu*.⁹⁶ Specifically, dismissals based on criminal misconducts indeed have effects tantamount to criminal persecution. As a result, they needed to be treated with caution. The common law courts seem to have exercised caution when dealing with criminal misconducts. They greatly leaned on the natural justice principles to deliver fairness. They perceived the law of the day as unstable and insufficient. According to these courts, the Basic Conditions of Employment Act 75 of 1997, as amended, was inadequate and did not constitute proper compliance with the requirements of the *audi alteram partem* rule.⁹⁷

The efforts of the common law justices were, however, not worthwhile due to the problems ensuing in the South African system of parliamentary supremacy. First, the measure of justice was only limited to defined races.⁹⁸

⁹⁴ See *Mine Workers' Union v Brodrick* 1948 4 SA 959 and *Federal Cold Storage Co v Angehern & Piel* 1910 TPD 1351.

⁹⁵ Levy A *Unfair Dismissals* 81–82.

⁹⁶ *Mahlangu v Cim Deltak, Gallant v Cim Deltak* 1986 7 ILJ 346 IC at 357–358.

⁹⁷ Bulbulia AM, J in *Mahlangu v Cim Deltak, Gallant v Cim Deltak* (1986 7 ILJ 346 IC Per Page J at 528. In the advent of the Constitution the new Act can cater for the requirement of audi alteram partem rule.

⁹⁸ Grawitzky above note 33.

Even so, courts were not at liberty to exercise their discretion.⁹⁹ The common law courts were also forced to abide by legislative swings, which deprived them of independence to use their discretion in deciding matters.¹⁰⁰ Parliament could undo any decision by retrospective legislation and pass discriminatory or unreasonable statutes, provided they were procedurally correct, which left the courts with no room to declare such practices illegal in the light of natural justice principles of fairness.¹⁰¹ Based on unclear interpretations, courts often negated their duty in fear of jeopardizing the limited powers that the law of the day offered them.¹⁰² There was no certainty. As a result, labour law jurisprudence lacked

⁹⁹ *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 9 BCLR 891 (CC) 895 para 6 (hereinafter *Bel Porto*). See as well, Beukes M *Interpretation of the Promotion of Administrative Justice Act* 33. Read Taitz above note 16 at 11 who exposes the position of common law courts justice before the coming into effect of the Constitution. Consider Monyakane Above note 9 at 37. As well read the following cases *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

¹⁰⁰ *Bel Porto* above note 98 at para 6. See as well Beukes above note 98 at 3. Read Taitz above note 16 at 11 who exposes the position of common law courts justice before the coming into effect of the Constitution. Consider Monyakane Above note 9 at 37; *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

¹⁰¹ *Bel Porto* above note 98 at para 6. See as well Beukes above note 98 at 3. Read Taitz above note 16 at 11, who exposes the position of common law courts justice before the coming into effect of the Constitution. Consider Monyakane above note 9. at 37; *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

¹⁰² *Bel Porto* above note 98 at para 6. See as well Beukes above note 98 at 3. Read Taitz above note 16 at 11, who exposes the position of common law courts justice before the coming into effect of the Constitution. Consider Monyakane above note 9 at 37; *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

consistency.¹⁰³ In light of the problems caused by the lack of protection of human rights from abuse under the common law tradition that practiced South African parliamentary supremacy, the constitutional era was expected to have changed the positions of employer and employee drastically. At the adoption of the Constitution, it was expected that a massive change to all the laws, including labour law, would follow.

The Constitution that comprises the Bill of Rights entrenching “various rights [impacting] on the formulation of labour market policy and labour law reform,”¹⁰⁴ including sections 9(1), 17, 23, 34, and 33 of the Constitution, was embraced with the hope for better law enforcement.

Section 23 of the Constitution entrenching the right to fair labour practices in section 23(1), is the base of individual labour law fair dismissal. It is therefore foundational to policy objectives in this area of South African labour law. The LRA enacted to give effect to section 27 of the Interim Constitution objectives in the current expression of section 23 of the Constitution. Section 23(1) deals with the right to fair labour practices.¹⁰⁵

According to Currie and De Waal,¹⁰⁶ “one of the declared purposes of the LRA is to ensure that the legislative framework governing labour relations is in accordance with the Bill of Rights, particularly, the right to fair labour practices .”¹⁰⁷ The rationale behind the entrenchment of this right was to include the equity concerns of the Industrial Court prior to the adoption of the Constitution. These concerns entailed over a decade of

¹⁰³ *Bel Porto* above note 98 at para 6. See as well Beukes above note 98 at 3. *Read Taitz* above note 16 at 11, who exposes the position of common law courts justice before the coming into effect of the Constitution. Consider *Monyakane* above note 9 at 37; *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 (AD) 651 652; *Union Government v Union Steel Corporation* 1928 (AD) 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 (TS) 111; *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 3 SA 651 (A).

¹⁰⁴ Sections 9(1), 17, 23, 34, and 33 of the Constitution. See Cheadle H 2006 *ILJ* 663–703 at 666.

¹⁰⁵ Currie I & De Waal J *The Bill of Rights Handbook* at 499.

¹⁰⁶ Currie I & De Waal J *The Bill of Rights Handbook* at 499.

¹⁰⁷ Currie I & De Waal J *The Bill of Rights Handbook* at 499.

jurisprudence.¹⁰⁸ It amongst others, composed the “entire terrain of individual dismissal law.”¹⁰⁹ Chapter VIII of the LRA deals with unfair dismissals and unfair labour practices. Section 185 of the LRA prohibits unfair dismissals. In a nutshell, according to the LRA, unfair dismissals constitute unfair labour practices.¹¹⁰ In attempting to unpack the constitutional meaning of unfair labour practice, Currie and De Waal opine, that it is important to consider what the Industrial Court pronouncements entailed.¹¹¹ According to the Industrial Court, lawfulness did not mean fairness.¹¹²

The Industrial Court perspective was aligned with the interpretation of fairness from the common law courts’ perspective. The common law courts were averse to positivists approaches to the interpretation of the law for effecting justice. They relied on the common law natural justice principles of fairness, the *audi alteram partem*¹¹³ and the *nemo iudex in propria sua causa*.¹¹⁴ It is argued that the Industrial Court’s exposition of fairness in dismissal, like that of common law courts’ understanding of fairness, was that natural justice principles of fairness must both be observed in order for rational, justifiable, and reasonable decisions to arise.

The wide constitutional exposition of fairness encapsulates essential fairness based on natural justice. The reading of the Preamble, sections 1,

¹⁰⁸ Currie I & De Waal J The *Bill of Rights Handbook* at 499; also read, Cameron E, Cheadle H and Thompson C *The New Labour Relations Act*:144-145.

¹⁰⁹ Currie I & De Waal J The *Bill of Rights Handbook* at 501.

¹¹⁰ Read section 185 (a) and(b) together.

¹¹¹ Currie I & De Waal J The *Bill of Rights Handbook* at 502.

¹¹² Currie I & De Waal J The *Bill of Rights Handbook* at 503. Lawfulness from a common law positivist perspective of the parliament sovereignty, lawfulness was what was in accordance with the four corners of the written law. This perspective disregarded the consideration of the rationales of the law in question regarding, in order to test whether the law was reasonable. See Monyakane above note 9 at 32 who states that, “Based on the Aristotelian description of justice as what is in accordance with the *nomos* or positive law, positivism is underpinned by the belief that law is what the authorities pass as law.” Also read, Van Der Vyver J D *Seven Lectures on Human Rights* 1; Hart 1958 *HARV LR* 596.

¹¹³ Meaning “hear the other side”.

¹¹⁴ Meaning “no one is to be judged in his own cause”.

8, 9, 23, 33, 35, 39, and 195 of the Constitution together expresses the wide constitutional fairness objectives.

Since the LRA gives effect to section 23 of the Constitution, the expectation that the transformative objective of the LRA fairness principles is actualised through the observation of the fairness principles of natural justice is not without basis. This holds especially true because common law natural justice principles of fairness are the same principles that underlie constitutional objectives in the Preamble, sections 1, 8, 9, 23, 33, 35, 39, and 195.¹¹⁵

These constitutional provisions underpin principles of natural justice as they are essential in a democratic state such as South Africa, where the need to protect individual rights is of paramount concern.¹¹⁶ Today, the aims of the principles of natural justice as expressed in these constitutional provisions are still necessary to promote fairness. Specifically, the aims are to observe reasonableness,¹¹⁷ fairness,¹¹⁸ equality,¹¹⁹ accuracy, efficiency, effectiveness, and accountability¹²⁰ in decision-making, and to impose a duty of fair hearing upon every decision maker so that individual rights are protected.¹²¹

The introduction of these natural justice principles has sustained a consistent application of fairness from the common law courts' insistence on the observance of equity to the now entrenched Bill of Rights. As shown above, based on natural justice principles of fairness, common law courts

¹¹⁵ See the Preamble of the Constitution and read it with section 1, 8, 9, 23, 33, 35, 39 and section 195 of the Constitution. As well consider Mureinik E 1994 *SAJHR* 32; Klare K 1998 *SAJHR* 146, who extensively discuss the constitutional perspective in relation to the exercise of authority. As well, read Preamble; chapter 1 and section 23 read with sections 8 and 39 of the Constitution.

¹¹⁶ Read Mureinik E 1994 *SAJHR* 32; Klare K 1998 *SAJHR* 146, who extensively discuss the constitutional perspective in relation to the exercise of authority. As well, read Preamble; chapter 1 and section 23 read with sections 8 and 39 of the Constitution.

¹¹⁷ In section 33 of the Constitution.

¹¹⁸ In sections 23(1) read with sections 33 and 35.

¹¹⁹ In section 9 of the Constitution.

¹²⁰ See section 195 of the Constitution.

¹²¹ *R v Home Secretary, ex parte Hosenball* 1977 (1) W L R 766, 772. Also see, Mureinik E 1994 *SAJHR* 31,32; Klare K 1998 *SAJHR* 146.

used a wide definition of fairness as a counter to the draconian common law position, which insisted on lawfulness in the absence of the constitutional protections. In the common law era, lawfulness was confined within the four corners of the statute.¹²² Thus, common law statutes were interpreted from a positivist approach.

The current culture of human rights introduced by the Constitution was missing. The South African system of parliamentary supremacy allowed procedures and laws that limited judicial review and access to courts. South African parliamentary supremacy thwarted court intervention in cases where labour matters were at issue and in turn resulted in a lack of respect to individual rights.¹²³ The Industrial Court's efforts were adversely affected. As a result, the enforcement of the right to fair labour practice was not only rare, but also difficult to achieve.¹²⁴

The current section 23(1) fair dismissal processes operationalised through the LRA are expected to stabilise the predicaments sustained under common law black letter law applications. If labour law, dealing with fair

¹²² They followed the black letter law principle. A principle of law so notorious and entrenched that it is commonly known and rarely disputed even if its not rational, it was applied as it is. Black Letter Law Definition - Duhaime.org [http:// www.duhaime.org](http://www.duhaime.org) › Legal Dictionary [accessed 9 Jan 2019].

¹²³ *Bel Porto* above note 98 at 895 para 6. See as well Beukes above note 98 at 3. Read Taitz above note 16 at 11, who exposes the position of common law courts justice before the coming into effect of the Constitution. Consider Monyakane above note 9 at 37 where she explained the extent of judicial review during the common law era, in particular read chapter two at part 2 2 4 on the extent of judicial review of administrative action under common law. As well read the following cases *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

¹²⁴ *Bel Porto* above note 98 at 895 para 6. See as well Beukes above note 98 at 3. Read Taitz above note 16 at 11, who exposes the position of common law courts justice before the coming into effect of the Constitution. Consider Monyakane above note 9 at 37 where she explained the extent of judicial review during the common law era, in particular read chapter two at part 2 2 4 on the extent of judicial review of administrative action under common law. As well read the following cases cases *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

dismissals, is based on section 23(1) in the Bill of Rights read with the LRA which aimed at operationalising the right to fair labour practice and still do not conform to the constitutional objectives in the Preamble read with sections 1, 8, 33, 35, 39, and 195, it would be contrary to the expectation that the constitutional era would stabilise the common law courts irregular application of equity principles expected in the operationalisation of the right to fair labour practice.

Unfortunately, jurisprudence reveals that the operationalisation of section 23(1) negates the wide constitutional interpretation perspective. Jurisprudential interpretation of section 23(1) read with the LRA allows the employer to investigate and hear matters against employees who are alleged to have committed criminal misconducts without paying attention to section 35 of the Constitution mandating the implementation of natural justice fairness principles for the protection of criminal suspects. This oversight is contrary to the Industrial Court equity rationales underlying section 23(1). Unlike the Industrial Court, which encouraged the observation of equity under judicial review in the past regime of common law, the current perspective ignores it. The result of this is that those employees who are suspected of criminal misconducts are subjected to harsh investigation procedures¹²⁵ and hearing processes by the employer—contrary to section 35 of the Constitution mandating fairness principles regarding the treatment of criminal suspects.¹²⁶ It is submitted that this approach ignores the foundational constitutional principles and objectives.¹²⁷

Read together, item 4(1) of the Code of Good Practice: Dismissal¹²⁸ and the explanatory memorandum,¹²⁹ authorise employer investigations,

¹²⁵ contrary to investigation laws under the CPA and section 35 of the Constitution.

¹²⁶ See section 35 of the Constitution, dealing with the right to fair trial. Read this section together with *S v Orrie and Another*, 2005 1 SACR 63(C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56.

¹²⁷ In the Preamble, sections 1, 8, 9, 33, 35, 39 and 195 of the Constitution.

¹²⁸ Schedule 8 of the LRA.

¹²⁹ Schedule 8 of the LRA.

including employer criminal investigations. These pre-dismissal processes are without section 35 principles of fairness, including the right against self-incrimination. Although item 4(1) of the Code of Good Practice: Dismissal is considered a guideline, its value as a statutory authority is overwhelming. It is the yardstick for procedural fairness in all dismissal investigations. “Section 188(2) of the LRA, places an obligation on any person who is adjudicating the procedural fairness of a dismissal, ‘to take into account any relevant code of good practice’ issued under LRA.”¹³⁰

The purpose and the objective of the inscribed code of good practice procedure can be discerned from the wording of the explanatory memorandum which accompanies the draft of the LRA. Specifically, the explanatory memorandum states that: “The draft Bill requires a fair, but brief, pre-dismissal procedure...[it] opts for a more flexible, less onerous, approach to procedural fairness”.¹³¹

In *Avril Elizabeth Home for the Mentally Handicapped v The Commission for Conciliation, Mediation and Arbitration & Others*, (hereinafter *Avril*)¹³² Van Niekerk AJ held:

*It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct, ¹³³ by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.*¹³⁴

¹³⁰ Naidoo M 2015 *De Rebus* 57.

¹³¹ Per Explanatory Memorandum to the draft Labour Relations Act 66 of 1995. As well read, *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2006) 9 BLLR 833(LC) at paras [5] and [7] where it exposes the context of fairness expected from the employer.

¹³² 2006 9 BLLR 833 (LC) at 838; 2006 27 ILJ 1644 (LC) at 1652.

¹³³ Including criminal misconducts.

¹³⁴ *Avril* above note 6 at 838 and at 1652. Also see *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA).

The court further held that the new procedure was “informal”¹³⁵ and did away with the criminal justice model of procedural fairness that had been developed by the Industrial Court and applied under the unfair labour practice jurisdiction that evolved under the 1956 LRA.¹³⁶ The employer is no longer mandated to follow a formal disciplinary procedure. This exempts the employer from observing and applying the *rules of evidence*. Under the Act, the employer *may choose any means* of securing the evidence to fortify the criminal allegation against the employee criminal suspect.

Furthermore, in the case of *Old Mutual Life Assurance Co SA Ltd v Gumbi*¹³⁷ it was held that “[t]he right to a pre-dismissal hearing imposes upon employers *nothing more*¹³⁸ than the obligation to afford employees the opportunity of being heard before the employment is terminated by means of dismissal.”¹³⁹ It is submitted that this approach opts for the view that the statutory right to fair dismissal observes the principles of fairness in part. It recognises the *audi alteram partem* rule¹⁴⁰ but ignores the *nemo iudex in propria sua causa* rule.¹⁴¹ This is indeed a laissez-faire observance of natural justice principles contrary to the constitutional objectives.

It is observed that, in investigating employee criminal misconducts and subsequently determining the employee criminal suspect’s guilt within the disciplinary hearing process, the employer is exempted from observing the second leg of the principles of natural justice.

In accordance with Naidoo’s reading of item 4 (1) of Schedule 8 Code of Good Practice: Dismissal (item 4(1) of schedule 8) of the LRA,¹⁴²

¹³⁵ *Avril* above note 6 at 838 and at 1652. The unjustifiable effects of *informal investigations* are imminent in these processes. Consider Gonzalez L G Connelly B G and Eliopoulos E 1993 *American Criminal Law Review* 1179-1220 at 1179; Eckers S R 1998 *Hofstra Law Review* 109; Bennet P J 2011 *American Criminal Law Review* 381; McCastlain J C and Shonner L S 1986 *Public Contract Law Journal* 418–445; Hasset M J 1979 *Washington and Lee Law Review* 1049; Marvil F H and James A W 1991 *Missouri Law Review* 869.

¹³⁶ *Avril* above note 6 at 838 and at 1652.

¹³⁷ 2007 (5) SA 552(SCA) at para [8].

¹³⁸ My emphasis.

¹³⁹ *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA), at para [8].

¹⁴⁰ Meaning hear the other side.

¹⁴¹ Meaning no one is to be judged in his own cause.

¹⁴² Naidoo M 2015 *De Rebus* 57.

reiterating the informality and flexibility of the employer processes, it is submitted that in effect the pre-dismissal processes comprise of seven statutorily entrenched steps for employer criminal investigation.

First, the employer is mandated to investigate and establish evidence upon which to charge the employee. Second, the employer reaches the conclusion that the employee is a criminal and makes a finding to dismiss the employee. Third, fourth, and fifth respectively:

the employer inform [s] the employee of the allegations that need to be discussed, the employer informs the employee of the date on which the discussion will take place—that is within 48 hours' notice or more so that the employee prepares for the hearing. The employer tables the gathered evidence before the employee.¹⁴³

Sixth, the employer gives the employee the opportunity to speak in reaction to the tabled evidence. Finally, the employer, after hearing the employee, makes a decision as to whether the employee is guilty of the misconduct and, if so, determines an appropriate sanction and informs the employee about it.¹⁴⁴ This is in satisfaction of the “only, [one] rule of natural justice applicable to the pre-dismissal process—the *audi alteram partem*—the opportunity to be heard.”¹⁴⁵

Contrary to this scenario, even though courts acknowledged that the concept of fairness is wider than unlawfulness, thus making unlawfulness an aspect of the concept of fairness, our jurisprudence on fair dismissal overemphasises either fairness with regard to breach of employment contract or fairness as far as it falls within LRA expertise limitations.¹⁴⁶ Thus, other constitutional fairness aspects such as section 35 fairness principles, inferred in employer criminal investigations; in matters concerning

¹⁴³ Naidoo M 2015 *De Rebus* 57 (emphasis).

¹⁴⁴ *Mahlangu v Cim Deltak, Gallant v Cim Deltak*, 1986) 7 ILJ 346 IC at 357–358.

¹⁴⁵ Naidoo M 2015 *De Rebus* 57.

¹⁴⁶ See *Fedlife Assurance Ltd v Wolfaardt* 2001 12 BLLR 1301 para 2.

employee criminal suspects, are left outside of the realm of employer labour law fairness.

1 2 Statement of the problem

In labour law procedures for employer criminal investigations and hearing processes for dismissal of employee criminal suspects, the employer can carry on to finality without paying regard to the effects of the ensued processes on the employee criminal suspect's rights entrenched in section 35 of the Constitution.

According to Grogan,¹⁴⁷ even though the employee may argue that the questions that the employer is demanding answers for may be incriminating, the employer at the employee's disadvantage may continue with the hearing because in terms of the statutory powers the employer has no obligation to bend towards employee's request.¹⁴⁸

The employer is entitled to continue with the dismissal process regardless of a plea from the employee, that certain question enquire self-incrimination.¹⁴⁹ The basis of such bearing is in consonance with labour law jurisprudential perspective to the extent of which employer may observe natural Justice principles compliant processes.

In *Avril*¹⁵⁰ Van Niekerk AJ expressed the nitty- gritty of a dismissal hearing as nothing analogous to a trial either civil or criminal. He held the essence of a dismissal hearing to be just a chance to hear an employee suspect without necessarily adhering to specific trial formalities.¹⁵¹

¹⁴⁷ Grogan J *Dismissal* (2018) 213.

¹⁴⁸ Grogan J *Dismissal* (2018) 213.

¹⁴⁹ Grogan J *Dismissal* (2018) 213.

¹⁵⁰ *Avril* above note 6 at 1652.

¹⁵¹ (2006) 9 BLLR 833(LC) at 838; 2006 (27) ILJ 1644 (LC) at 1652.

The implications of this reasoning eventualised hearings that do not observe the substance entailed in justiciable procedural principles. For example, it was no longer mandatory that hearsay evidence sought to be introduced in employee suspect's hearing be subjected to necessary tests. Based on this understanding, Basson J¹⁵² held in favour of admitting hearsay evidence in a disciplinary hearing even though the accused employee ought to state its case and answer to the levelled charges.

In another case *Mohammed v Chicken Licken* ¹⁵³Van Aarde reiterated *Avril Elizabeth Home for the Mentally Handicapped v CCMA (2006) 27 ILJ 1644 (LC)* contains in no uncertain terms the procedural requirements to be met before an employer can dismiss its employees. These are basic rules of natural justice.”¹⁵⁴ In another CCMA matter, Commissioner Bishiwe rejected the argument that the chairing of employee disciplinary by employer was unfair. The CCMA had the following to say:

The applicant challenges his dismissal as procedurally unfair due to Mr Thomson chairing the disciplinary enquiry. The applicant expected that a neutral third party would chair the enquiry; however, no evidence was adduced by the applicant to show that Mr Thomson conducted himself in any manner that can be construed as biased or unfair. A disciplinary enquiry is not a workplace trial. It is meant to be a platform where an employer gives an accused employee a right to put across his own version and be heard before a decision is taken on any alleged misconduct. The courts have even gone as far as to say that a disciplinary hearing need not even be held, as long as the employer can show that he had given an employee the right to be heard before taking a decision on the alleged misconduct. In Avril Elizabeth Home for the Mentally Handicapped v CCMA ,¹⁵⁵ the Labour Court

¹⁵² *Fawu obo Kapesi v Premier Foods Ltd* (GF8274) 4.05.2010] [2010] JOL 25623; [2010] 9 BLLR 903; (2010) 31 ILJ 1654 (LC) para [46].

¹⁵³ (2010) 31 ILJ 1741 (CCMA) para 5.3.1

¹⁵⁴ *Mohammed v Chicken Licken* (2010) 31 ILJ 1741 (CCMA) para 5.3.1.

¹⁵⁵ 2006) 27 ILJ 1644 (LC); [2006] 9 BLLR 833 (LC).

*emphasized that arbitrators must not apply a test for procedural fairness that is more stringent than that required by the Code of Good Practice: Dismissals. The code guides employers to adopt a simple procedure in their disciplinary proceedings and not the criminal justice model. I have assessed the role played by Mr Thomson in this matter and have found that he acquitted himself fairly in his role, first as the superior to whom the matter was reported and thereafter as the presiding officer in the disciplinary hearing.*¹⁵⁶

It is submitted that the Commissioner's reasoning on the predecessor judgments regarding the extent to which employer can honour natural justice principles entails the unjustifiable essence of employer's criminal investigative procedures and subsequent criminal misconduct hearing processes. It would therefore not be without basis to argue that the entailed employer criminal investigative procedures and subsequent disciplinary hearings based on criminal misconducts seek to criticise the normal fairness processes in matters of criminal law nature. Instead of honouring equity-based principles of justice embedded in natural justice, which were later entrenched in the South African Constitution's Bill of Rights, they undertake to oppose and condemn them. Such undertakings are exposures of rushed justice with the aim of neglecting the rationale for proportionality when dealing with matters of criminal law nature.

From this understanding, it is argued that the LRA is interpreted to be excluding the need for employer's observance of the principle of fairness for criminal suspects entrenched in section 35 of the Constitution and entailing the principle *nemo iudex in propria sua causa*.¹⁵⁷ It is argued further that such an allowance immunises employers from effectively observing natural justice principles of fairness aimed at neutralising the harsh effects of condemnation and labelling of individuals as criminals.

¹⁵⁶ In *Smit v Nashua East London* (2010) 31 ILJ 1751 (CCMA) at para [13].

¹⁵⁷ No man shall be judged in his own cause also referred to as the rule against bias.

Against the constitutional rationales of criminal justice,¹⁵⁸ where the pre-dismissal process concerns an employee who committed a criminal misconduct, the suspect is subjected to the risks of self-incrimination.

The employer's failure to observe the second leg of natural justice principles entrenched in section 35 of the Constitution happens regardless of the fact that the principle of fairness, that no man shall be persecuted at his own cause, is constitutionally entrenched in the principles establishing the rights of criminal suspects within which employees suspected of criminal misconducts fall.¹⁵⁹ Under the Constitution, natural justice principles are deemed essential for the enforcement of wide constitutional fairness.

It is argued that the interpretation of the LRA to the exclusion of the second leg of natural justice principles allows the employer to disregard the constitutional objectives of fairness in section 35 of the Constitution. The said objectives entrench the rights of criminal suspects from self-incrimination. It is considered that such ignorance is against the objectives of constitutional fairness. It is further argued that the LRA designed approach is a negation of the fact that there could be other constitutional based reasons, which could affect the fairness of the processes aimed at disciplining and dismissing an employee criminal suspect.

In some cases, it becomes apparent that the reason for dismissal even though indicated as fair could be founded on unlawful exercise of employer's power to simultaneously investigate crime and preside on criminal condemnation hearings. The examples to these cases include criminal misconduct cases. In order to hold dismissal hearings based on

¹⁵⁸ See section 35 of the Constitution, dealing with the right to fair trial. Read this with *S v Orrie and Another*, 2005 1 SACR 63(C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56.

¹⁵⁹ Section 35 of the Constitution, entailing the right to fair trial. Also read *S v Orrie and Another*, 2005 1 SACR 63(C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56.

criminal misconducts, the employer will have to informally secure evidence.¹⁶⁰

In this attempt, the employer will not follow the permissible means of investigating criminal suspect under the CPA because the LRA does not require the employer to follow formal means of investigation. In this situation, the means of investigation founding the LRA required “fair reasons to dismiss,” is unlawful. Many faults can be pinpointed in this case, including the fact that the employer ignored the constitutional rights of the employee criminal suspect. As a matter of justice, the employer’s investigation and disciplinary hearing processes become flawed.

The thesis refers to a myriad of cases that expose the challenges that ensue in the approach that ignores the employee criminal suspects’ rights as a criminal suspect. For example, the case of *AMG Coetzer v Registrar of Financial Services Provider A45/2014*,¹⁶¹ where an employee was not afforded an opportunity to be heard after the employer had investigated her criminality. During the hearing, the employee incriminated herself because her right against self-incrimination was never observed by the employer investigation procedure and subsequent hearing for dismissal.

As indicated, the *Coetzer* matter forms part of a myriad of cases¹⁶² meant at enforcing the “right to fair dismissal,” entrenched in section 23(1) of the Constitution and operationalised through the LRA. All these cases imply that the employers do not observe constitutional transformative fairness ensconced in the Preamble, read with sections 8, 9, 23, 33, 35, 39 and 195

¹⁶⁰Read *Mahlangu v Cim Deltak*, *Gallant v Cim Deltak* (1986) 7 ILJ 346 IC at 357–358 where Bulbulia AM J explains the challenges of criminal persecution within the civil law perspectives of labour law.

¹⁶¹ *AMG Coetzer v Registrar of Financial Services Provider A45/2014*. <https://www.masthead.co.za/wp.../FSB-Appeal-Decision-AGM-Coetzernee-Kriel.pdf>. unreported (hereinafter *Coetzer*).

¹⁶² See a full discussion of this case in chapter four part 4 2 6 dealing with the opportunity of the employee to state a case and to challenge the employer’s evidence and arguments.

of the Constitution in the execution of fair dismissals. They do not follow the constitutional demands that the interpretation of legislation and development of the common law or customary law by courts, tribunals or forums must promote the spirit, purport and objectives of the Bill of Rights.¹⁶³ These constitutional objectives and values are entrenched in the Preamble, sections 1, 8, 9, 23, 33, 35 and section 195 of the Constitution.¹⁶⁴ Their rationale is to transform our legal perspective from authoritarian to the realisation of constitutional transformative objectives which aim at a rights-based decision making.¹⁶⁵

Contrary to the constitutional call, when employers investigate, and discipline employees suspected of criminal misconduct, they do not observe rights of suspects espoused in section 35 of the Constitution. First, they overlook the right to privacy without applying necessary limitations and precautions applicable when such a right is compromised. Further, they disregard the constitutional rationale of section 35 fairness. They encourage self-persecution forbidden by the Constitution in section 35 read with the CPA. When the hearings for dismissals based on criminal misconducts are carried out, employee suspects of criminal misconducts are asked to provide answers against employers' accusations at the risk of self-incrimination.¹⁶⁶

The insistence that the employee criminal suspects divulge evidence that is incriminating sacrifices the principle of fairness that no man shall be

¹⁶³ *Pharmaceutical Manufacture Association of South Africa In Re: The Ex parte Application of the Republic of South Africa* 2000 (2) SA 674 (CC) 49.

¹⁶⁴ Chapter 1 of the Constitution entrenches the founding provisions that include supremacy of the Constitution.

¹⁶⁵ Mureinik E 1994 *SAJHR* 31, 32; Klare K 1998 *SAJHR* 146, who extensively discuss the constitutional perspective in relation to the exercise of authority.

¹⁶⁶ This is tantamount to coerced and involuntary confessions and admissions to criminal allegations. Involuntary admissions and confessions are against constitutional demands of fairness entrenched in section 35 of the Constitution. They are as well unprocedural in terms of the CPA. See sections 217 and 219A of the CPA.

persecuted at his own cause.¹⁶⁷ Grogan states that an employee who persists against self-incrimination stands to lose an opportunity to give explanation regarding criminal allegations levelled against the employee. Regardless of the employee's objections, the employer may continue unhindered with criminal investigations and subsequent dismissal based on criminal misconducts without the aggrieved employee's participation. In these circumstances, the employer is not by law or any means forced to observe the employee criminal suspect's plea for the constitutional right against self-incrimination.

Where such compromises as it transpires in employer criminal investigations and employer disciplinary hearings based on employee criminal misconducts are made a law, in the guise to fair dismissal processes, they let employee suspects incriminate themselves. On the other hand, employers can exercise criminal investigative and disciplinary authority without observing necessary constitutional guidelines and objectives in sections 8,9; 33, 35, 39 and 195.

Based on these errors which are detrimental to the wide constitutional fairness principles, it is argued that the procedure engaged by the employer when involved in criminal investigations of employee criminal suspects and the subsequent hearings for dismissals based on criminal misconducts are unfair and therefore unconstitutional. The established instruction that employers have no duty to observe natural justice principles hampers reasonableness and fairness in their decision making.¹⁶⁸ This instruction is therefore a clear disregard of the constitutional objectives for justice. It offends theories and laws underlying justice for matters of a criminal law nature. This approach is unfair to the class of criminal suspects who are also employees. It amounts to unnecessary inequalities in criminal

¹⁶⁷ Grogan J *Dismissal* (2018) 213.

¹⁶⁸ see van Niekerk A 2012 *Acta Juridica* 102, 105.

persecution law and is against the constitutional principle that there should be observance of equal treatment of suspects.

The same approach exposes South Africa, as lagging behind other states, which shared a similar common law with it. As opposed to South Africa as far as the application of the rights to remain silent and against self-incrimination are concerned in employment hearings, these common law states have advanced. While South Africa is still lagging, the United States of America; the New Zealand and the United Kingdom have advanced, in that employers investigating employee criminal misconducts operate under a defined jurisprudence entailing the right to silence and against self-incrimination. As far as South Africa is concerned, the developments shown in the United of States America; the New Zealand and the United Kingdom jurisprudence summons South Africa to align with these developments.¹⁶⁹ It was expected that our law, especially that of civil law dealing with investigative matters of criminal law nature, should observe the right against self-incrimination principles entrenched in section 35 of the Constitution.

1 3 Item 4 (1) of Schedule 8 Code of Good Practice: Dismissal

Item 4(1) of schedule 8 entails the nitty- gritty of fair procedure in labour law. According to item 4 (1) of Schedule 8, to determine whether there are grounds for dismissal, employers are mandated to conduct investigations against employees suspected of misconduct. In carrying out their mandate, their investigation need not be a formal enquiry. However they have to notify the employee suspects “of the allegations [against him or her] using a form and language that the employee can reasonably understand.”¹⁷⁰ Further,

¹⁶⁹ To name a few, see the reasoning in *Garrity v. New Jersey* 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lachance v. Erickson*, 118 S.Ct. 753, 139 L.Ed.2d 695; *Bryson v. United States*, 396 U.S. 64; *U.S. v. Wong*, 431 U.S. 174; *U.S. v. Dunnigan*, 507 U.S. 87; *Hale v. Henkel*, 201 U.S. 43; *Baxter v. Palmigiano*, 425 U.S. 308.

¹⁷⁰ Item 4 of schedule 8.

“the employee should be allowed the opportunity to state [his/her] case in response to the allegations[against him/her].”¹⁷¹

Furthermore, the employer must allow the employee “a reasonable time to prepare the response and to [have] the assistance of a trade union representative or fellow employee [who can come to the hearing to help the employee listen to the allegations.]” When all is done, after the [hearing,] “the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.”¹⁷²It is possible to undermine the powers that item 4(1) embeds in the employer but a critical reading of it exposes a cause for concern especially when viewed from a wide perspective of constitutional fairness. An appropriate example is the circumstance where the employer must investigate a criminal misconduct and subsequently conduct a hearing to establish the guilt of the employee suspected of a criminal misconduct. In that case, the employer found reasons for dismissal. If the employer fails to furnish reasons for dismissal, the employer’s decision would be labelled unfair against section 23 (1) read with Chapter VIII of the LRA dealing with unfair dismissal and unfair labour practice.¹⁷³

Since the employer’s mandate within item 4 (1) allows the employer to be flexible and informal, the employer need not observe other peripheral legal concerns impacting on the employer criminal investigations and subsequent determination of employees’ guilt before dismissal. Other than the power that the employer already has against the employee, culminating from the nature of the employment contract, item 4 (1) immunises the employer from scrutiny for possible prejudices that the employer’s criminal investigations procedures and subsequent dismissal hearing processes may pose. This thesis opposes employer’s flexibility canvassed in item 4 (1)

¹⁷¹ Item 4 of schedule 8.

¹⁷² Item 4 of schedule 8.

¹⁷³ *Jeffery v President, South African Medical and Dental Council* 1987 (1) SA 387 (C) at 395 D-G.

of Schedule 8, fair procedure for dismissal of employees suspected of criminal misconduct.

The thesis rather supports the need to adopt proportionality-based fair procedure entrenched in section 35 of the Constitution prescripts. It proposes that when employee criminal suspects are investigated and disciplined in dismissal hearings the employer must follow wide constitutional perspective of fairness. It vouches that wide constitutional perspective of fairness encompass the Industrial Court equity principles. It argues that the Industrial Court principles of equity took both natural justice principles into account. This thesis views the adoption of the Industrial Court's equity perspective when dealing with employee criminal suspects' dismissals as correct since it observes the foundational principles of fairness in section 23 of the Constitution. Such an adoption is tantamount to observing wide constitutional principles of fairness now entrenched in sections 23 (1) read with the Preamble, sections 1,8,9, 33, 35, 39 and 195 of the Constitution.

1 3 1 The relationship between section 23(1) and Item 4 (1) of LRA Schedule 8: Code of Good Practice

Section 23 of the Constitution is part of the Bill of Rights entrenched in the Constitution. It affords the right to constitutional labour relations. Section 23(1) entrenches the right to fair labour practices for everyone. The interpretation of this right is made easy by reference to the equity principles of the common law Industrial Court jurisprudence on equity. Many writers emphasised that the right to fair labour practices was founded on the Industrial Court equity extrapolation.¹⁷⁴ According to Currie and de Waal,

The Industrial Court was intended to be a forum in which labour disputes could be dealt with by judicial means, thereby preventing labour grievances spilling over into the political arena. Over the next

¹⁷⁴ Amongst others, see van Niekerk A 2012 *Acta Juridica* 102, 105 and Currie I & De Waal J The *Bill of Rights Handbook* at 501.

*ten years the court used its equity jurisdiction to judicialise labour relations by setting out in its awards what were acceptable practices and what were not. These pronouncements effectively revolutionised the law governing labour relations in South Africa and led to the fleshing out of the concept of the unfair labour practice. Unfair labour practice pronouncements by the Industrial Court traversed the entire terrain of individual dismissal law and collective bargaining law. Mindful of the jurisprudence so developed, the drafters of the Constitution were determined to constitutionalise the gains that had been made.*¹⁷⁵

The Industrial Court decisions on employer and employee fair practices were informed amongst others by natural justice principles of fairness, namely the principles *audi alteram partem*¹⁷⁶ and *nemo judex in propria sua causa*.¹⁷⁷ In cases where the commission of crime was the cause for dismissal, the Industrial Court jurisprudence insisted on fair procedure that observed the principle against self-incrimination.¹⁷⁸ Be that as it may, Chapter VIII of the LRA covers unfair dismissal and unfair labour practices.

The interpretation of fair dismissal is ensconced in the reading of Chapter VIII provisions together with Schedule 8 Code of Good Practice: Dismissal, provisions. Section 186 in this chapter classifies dismissal and unfair labour practice within prescripts of fair labour practices. Sections 187 and 188 outline the characteristics of unfair dismissal. Unfair dismissals are in essence, unlawful dismissal and therefore not in accordance with affording employees the right to fair labour practices afforded in section 23(1) of the Constitution. One aspect of lawful dismissals is the kind of dismissal where the employer can show that “the dismissal was effected in accordance with

¹⁷⁵Currie I & De Waal J *The Bill of Rights Handbook* at 501.

¹⁷⁶Meaning hear the other side.

¹⁷⁷ No man shall be judged in his own cause also referred to as the rule against bias. It also incorporates the principle.

¹⁷⁸ per Bulbulia AM, J in *Mahlangu v Cim Deltak, Gallant v Cim Deltak* (1986) 7 ILJ 346 IC at 357-358. As well, see *Davis v Tip No 1996* (1) SA 1152 (W) 1157F-G and 1158 G-H. Applied from labour law perspective in Grogan J *Workplace Law* (2017) 256; From a civil procedure perspective in Cilliers A C , Herbstain J, Loots C; Nel HC *The civil practice* at page 757 and from a human rights perspective in Currie I & De Waal J *The Bill of Rights Handbook* at 745.

a fair procedure.”¹⁷⁹ Item 4 of Schedule 8 outlines what is meant by fair procedure pertaining to dismissal. Item 4, reads,

4.Fair procedure. — (1) *Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.*

(2) *Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.*

(3) *If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.*

(4) *In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.*

The reading of item 4 (1) implies a legislated allowance to the employer to investigate employee criminal suspects without observing formal approaches in section 35 of the Constitution.¹⁸⁰ Thus, within progressive discipline-oriented labour law processes, the employer can devise a procedure flexible enough to secure an employee response to the allegations without looking at the rationales of fairness principles engaged

¹⁷⁹ Section 188 (1)(b) of Chapter VIII: Unfair Dismissal and Unfair Labour Practice.

¹⁸⁰ *Avril* above note 6 at 1652. As well see *Sidumo v Rustenburg Platinum Mines Ltd and Others* 2007 28 ILJ 2405 (CC); 2007 12 BLLR 1097 (CC) at para 59 (Sidumo). Also read *Matsekoleng v Shoprite Checkers (Pty)Ltd* (2013) 2 BLLR 130 (LAC) paras 54-57. *Mohammed v Chicken Licken* (2010) 31 ILJ 1741 (CCMA) para 5.3.1.

in criminal persecution. It is argued that Item 4(1) procedure, if applied to cases where employees are suspected of criminal misconducts, would not enable the application of ensued equity principles that the Industrial Court used to apply when dealing with such cases.¹⁸¹

The employer who blindly adheres to item 4 (1) fair procedure would not bother to observe fair process entailed for suspects of crime—even though dealing with employees suspected of the commission of crime. In the circumstances, it is argued that Item 4(1) of the LRA provides a narrow approach to fairness as opposed to the former wide approach by the Industrial Court, now introduced in section 23(1) providing for the right to fair labour practices. If the LRA seeks to interpret fairness for criminal suspects as narrowly as depicted in our jurisprudence,¹⁸² it would seem the interpretation of the right to fair dismissal is porous. Through this interpretation, the employer's investigatory and disciplinary hearing processes regarding employees suspected of criminal misconducts are no more remedial but are draconian. The jurisprudential underpinnings relate this to the transition from Common law to the current LRA prescripts. The changes in the flow of law brought changes in the execution of the law. In the past, contract law sought remedies in common law. This meant that labour law cases could be taken to the Industrial Court. The Industrial Court observed and could test fairness regarding criminal offenses along the

¹⁸¹ In accordance with the Industrial Court equity jurisprudence which was appreciated in founding section 23 of the Constitution. The Industrial Court equity jurisprudence which appreciated the complexity of dismissals based on criminal misconducts observed individual rights against self-incrimination and insisted on compliance with fairness principles of natural justice. per Bulbulia AM, J in *Mahlangu v Cim Deltak, Gallant v Cim Deltak* (1986) 7 ILJ 346 IC at 357-358. As well, see *Davis v Tip No 1996* (1) SA 1152 (W) 1157F-G and 1158 G-H. Applied from labour law perspective in Grogan J *Workplace Law* (2017) at page 256; From a civil procedure perspective in Cilliers A C , Herbstain J, Loots C; Nel HC *The civil practice* at page 757 and from a human rights perspective in Currie I & De Waal J *The Bill of Rights Handbook* at 745.

¹⁸² *Avril* above note 6 at 838 and at 1652. As well see *Sidumo* above note 180 at para 59. Also read *Matsekoleng v Shoprite Checkers (Pty)Ltd* (2013) 2 BLLR 130 (LAC) paras 54-57. *Mohammed v Chicken Licken* (2010) 31 ILJ 1741 (CCMA) para 5.3.1.

criminal procedure demands.¹⁸³ In the LRA era, labour law matters are statutorily mandated to the Labour Court. Supposedly this court is manned by experts in labour law.

The Labour Court focuses on issues of expertise. In particular, the focus is on whether the evidence on table constitutes fair reason and not whether constitutionally mandated fair processes for suspects of crime were followed to gather the evidence. Contrary to both constitutional substantive and procedural fairness demands, the Labour Courts are confined and limited to determine fairness within the four corners of the LRA. When fair reason within the four corners of the LRA becomes the focus, reasonableness, rationality and justiciability of employer's actions against employee criminal suspect become non-issues.

Labour law fairness addresses the end result only; namely, whether the employer followed item 4 (1) to establish the required fair reason in terms of section 188 (1)(a), at the same time disregarding the faults in item 4(1) mandated criminal investigation procedure used to determine fair reason for dismissing employee criminal suspects. In the light of the defects identified in the operationalisation of Item 4 (1) of the LRA schedule 8, whose code of good practice seeks to govern fair procedure for dismissal of employee criminal suspects, the constitutionality of employer's investigative and disciplinary hearing processes regarding employee's dismissal on the basis of criminal misconduct are questionable. At the center of this challenge is section 23(1) of the Constitution entrenching the right to fair labour practices. It is argued that against the equity principles founding section 23(1), item 4(1) procedural measures incurred towards the establishment of LRA, fair reason for dismissal of employees suspected of criminal misconducts is ultimately rendered unjust. The trite argument in this instance is that current jurisprudential interpretations of fair dismissal reveal

¹⁸³ per Bulbulia AM, J in *Mahlangu v Cim Deltak, Gallant v Cim Deltak* (1986) 7 ILJ 346 IC at 357-358. As well, see *Davis v Tip No 1996* (1) SA 1152 (W) 1157F-G and 1158 G-H.

that the means to the required LRA fair dismissal, namely; the employer's criminal investigations and disciplinary mechanisms for dismissal of employees suspected of criminal misconducts, does not justify the end. In light of the fact that employees suspected of criminal misconduct are criminal suspects covered by section 35 of the Constitution, the involved employer criminal investigations procedures and subsequent hearings for dismissals are unconstitutional. It, therefore, follows that such investigations are illegal, given that they disregard the constitutionally entrenched rights of criminal suspects.

1 4 Research questions

This thesis reflects on the following research question:

Does the employers' investigative procedures and disciplinary hearing processes align with the constitutional wide fairness, viewed in the light of broad constitutional fairness perspective anticipated in section 23(1) read with sections 1, 8, 9, 33,35, 39,195 and the preamble of the Constitution?

In other terms the thesis questions the constitutionality of employers' investigative procedures and disciplinary hearing processes with specific reference to dismissal of employees on the basis of criminal misconducts in South Africa.

1 5 The aims of the research

The main aim of this thesis is to investigate how constitutionally fair is employers' criminal investigation procedures and disciplinary hearing processes. The thesis aims at redefining fairness in employer's investigative processes and hearing procedures for dismissal of employees who committed criminal misconducts. It seeks to introduce wide

constitutional fairness perspective as opposed to the narrow interpretation of fairness within section 23 of the Constitution. Wide constitutional transformative fairness perspective is a concept of fairness which aligns with the human rights based constitutional objective. It implies fairness that observes all constitutional fairness prescriptions. Such entail the preamble, read with sections 1,8,9,23,33,35,39 and 195. The main source for this concern is that in moving from a common law positivist approach to the interpretation of the law under the Constitution of South Africa,1996, a rights-based approach was adopted. A rights-based approach entails the need to rationalise the law and writ it off possible unfairness, unreasonableness and unlawfulness. A rights-based approach interpretation questions whether the interpretation or the application of the law is justiciable. That is, it accords with constitutional objective in that individuals should not be deprived of their constitutional rights willy-nilly. The extent of this approach is that the Bill of Rights cannot be interpreted piece meal. In order that the interpretation of one right against the other right is avoided, rights within the Bill of Rights are interpreted while taking regard to other rights. Thus, the right to fair labour practice in section 23 of the Constitution, cannot be applied to the exclusion of other rights such as the rights in section 35 of the Constitution, for example, the rights against self-incrimination and related rights. Further, the thesis refers to the historical foundations of section 23 of the Constitution. It argues that section 23 of the Constitution right to fair labour practices is drawn among others, from the common law Industrial Court equity perspective on fair labour disciplinary processes. The equity perspective on fair labour disciplinary process observed both principles of natural law, - *audi alteram partem* and *nemo iudex in propria sua causa*. The thesis is concerned that the opposite is happening in the current constitutional era. Against the Wide constitutional fairness perspective *audi alteram partem* is respected within employer flexibility-based fairness while the other principle - *nemo iudex in propria sua causa* is ignored. The thesis argues for the reform of the current

jurisprudential expression of section 23 of the Constitution right to fair labour practices upon which item 4 (1) of Schedule 8 fair procedure for dismissal of employees suspected of criminal misconducts is based. It notes that the application of item 4 (1) of Schedule 8 fair procedure - for dismissal of employees suspected of criminal misconducts allows employers to condemn employees as criminals without following constitutionally mandated principles of fairness applicable on employee criminal suspects. In order to redefine the current perspective of labour law fairness for criminal misconducts hearings for dismissals, the thesis draws from the Industrial Court's application of common law fairness principles of natural justice to maintain equity in cases involving criminal misconduct.¹⁸⁴

The thesis appreciates that currently, employer-initiated criminal investigation procedures and disciplinary hearings processes for the dismissal of employees, who have committed criminal misconducts are based on item 4 of the Code of Good Practice: Dismissal. Within this Code, there are no defined procedures but the courts have mandated the employer to use flexible and informal procedures which are not equity based like the Industrial Courts used to perform.¹⁸⁵ Item 4 procedures accord flexibility to found progressive discipline processes, adopted in South African system of labour law.¹⁸⁶ In chapter four, it is found that flexible processes create an opportunity for multiple prejudices against employees suspected of criminal misconducts. The ensued challenges are evidenced in employer's criminal

¹⁸⁴ In accordance with the Industrial Court equity jurisprudence which was appreciated in founding section 23 of the Constitution. The Industrial Court equity jurisprudence which appreciated the complexity of dismissals based on criminal misconducts observed individual rights against self-incrimination and insisted on compliance with fairness principles of natural justice. per Bulbulia AM, J in *Mahlangu v Cim Deltak, Gallant v Cim Deltak* (1986) 7 ILJ 346 IC at 357-358. As well, see *Davis v Tip No 1996* (1) SA 1152 (W) 1157F-G and 1158 G-H. Applied from labour law perspective in Grogan J *Workplace Law* (2017) 256; From a civil procedure perspective in Cilliers A C, Herbstain J, Loots C; Nel HC *The civil practice* at page 757 and from a human rights perspective in Currie I & De Waal J *The Bill of Rights Handbook* at 745.

¹⁸⁵ of *Avril* above note 6 at 1652. As well see Sidumo above note 180 at para 59. Also read *Matsekoleng v Shoprite Checkers (Pty)Ltd* (2013) 2 BLLR 130 (LAC) paras 54-57. Myburg A & Bosch C *Reviews in the Labour Courts South Africa* (2016) 271-282.

¹⁸⁶ This process is explained in chapter two part 2 2 4 2 dealing with the theory of flexibility and its extent in criminal misconducts discipline.

investigations and employer's subsequent determination of employee's guilt before dismissal.¹⁸⁷ The thesis argues that employees suspected of criminal misconducts are a category of criminal suspects within the operation of section 35 of the Constitution.

These categories of criminal suspects are therefore investigated in an unconstitutional procedure, different from the constitutionally entrenched law dealing with criminal investigations.¹⁸⁸ Within the Constitution, criminal investigations are carried out from proportionality-based processes entrenched in section 35 of the Constitution.¹⁸⁹ Contrary to these constitutionally entrenched fair procedures, the hearings for the determination of employee criminal suspects' guilt before dismissals are executed in a different manner from the constitutionally entrenched processes.¹⁹⁰ The effect of these differences are irregularities and therefore unconstitutional results. Considering the constitutional fairness principles, coupled with the constitutionally entrenched transformative objectives in the Preamble, read with sections 1, 8, 9, 33, 35, 39 and 195, the thesis argues that there is a need to adopt wide interpretation of constitutional fairness for dismissal of employees criminal suspects. Thus, reading fairness principles in both sections 23, 33 and 35 of the Constitution, together with the constitutional transformative objectives in the Preamble and sections 1 and 195 of the Constitution. From a labour law fairness perspective, the entrenched principles in the Preamble, read with sections 1, 8, 9, 23, 33, 35, 39 and 195 should be interconnected to find the new meaning of fair labour practices. Consequently section 23 and the relevant LRA provisions would not be interpreted narrowly without paying regards to other constitutional provisions

¹⁸⁷ See chapter four in general and for examples see part 4.3 dealing with the repercussions of decisions based on employer interests against employees' rights. Read, *Mahlangu v Cim Deltak, Gallant v Cim Deltak*, 1986) 7 ILJ 346 IC at 357–358.

¹⁸⁸ The law dealing with criminal investigations is found in section 35 of the Constitution read with the CPA. See chapter two part 2.2.4.1 dealing with the theory of proportionality and its extent of application in criminal misconduct discipline.

¹⁸⁹ See chapter three and chapter four.

¹⁹⁰ See Chapters two, three and four. Read *Mahlangu v Cim Deltak, Gallant v Cim Deltak*, 1986) 7 ILJ 346 IC at 357–358.

entrenching fairness principles and other major constitutional objectives on transformation of legal prescripts.

In satisfaction of a wide interpretation of fairness within the constitutional transformative objectives, it is suggested that there ought to be a better process that mitigates the overreach of the exercise of employers' rights at the expense of concerned employees' rights as criminal suspects. As opposed to the current process, a new process akin to criminal procedure observance of constitutional fairness principles entrenched in section 35 of the Constitution, which was used under common law by the Industrial Courts is recommended. The new process will be a *sui generis* procedure that observes both civil and criminal standards for fairness while dealing with criminal concerns within the labour civil law prescripts.

The thesis will base the nature of the subject matter within the labour law civil processes of criminal investigation and dismissal hearings as the starting point to its choice of applicable fairness principles.¹⁹¹

The benchmark to constitutional fairness in labour law that seeks to deal with criminal misconduct should be aligned to the interpretation of section 23(1) within constitutional fairness transformative objectives. Such would be fairness based on both principles of natural justice as it used to happen under common law Industrial Court equity jurisprudence.

A recognised principle in the constitutional era is that the application and development of common law perspectives should be within the constitutional mandate. As Penning, Konjn & Veldman¹⁹² extrapolate, in "applying or developing the common law, section 8(3) of the Constitution play important role in that it mandates the courts to give effect to basic

¹⁹¹ *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

¹⁹² Penning F, Konjn Y & Veldman A eds *Social Responsibility and Labour Relations* (2008) 197; see *Gobbler v Naspers BPK another* 2004 5 BLLR 455 (c).

rights.”¹⁹³ They explain further that such an attempt would be attained by applying, or “if necessary, developing the common law to the extent that legislation does not give effect to [a particular] right.”¹⁹⁴ Coupled with section 8(3), section 39(2) is also of importance as it guides on how to go about expressing section 8(3) mandates. It requires the interpretation of “any legislation, [to]... promote the spirit, purport and objects of the Bill of Rights.”¹⁹⁵

It is submitted that the interpretation and application of LRA fairness in matters of criminal misconduct without observing the demands of the Bill of Rights, in particular, section 35 fairness principles for suspects of criminal misconducts (as the current labour law jurisprudence exposes) works against the demands and objectives of the Constitution.

On the basis of these concerns, it is trite to argue that the suggested observation of constitutional transformative principles will do away with the now strict and narrow labour law perspective of fairness engaged in disciplinary processes of employee criminal suspects; for, all told, these procedures lean more towards observing the principle of flexibility.¹⁹⁶ In chapter two the principle of flexibility is found to be capable of relaxing the stringent section 35 constitutional procedural protections against unfair criminal persecutions in cases of a criminal nature.¹⁹⁷ Such approach to fairness is devoid of the transformative constitutional fairness that observes proportionality central to criminal persecution. It is argued that engaging in

¹⁹³ Penning F, Konjn Y& Veldman A eds *Social Responsibility and Labour Relations* (2008) 197; see *Gobbler v Naspers BPK another* 2004 BLLR 455 (c).

¹⁹⁴ Penning F, Konjn Y& Veldman A eds *Social Responsibility and Labour Relations* (2008) 197; see *Gobbler v Naspers BPK another* 2004 5 BLLR 455 (c).

¹⁹⁵ Penning F, Konjn Y& Veldman A eds *Social Responsibility and Labour Relations* (2008) 197; see *Gobbler v Naspers BPK another* 2004 5 BLLR 455 (c).

¹⁹⁶ See *Booyesen v SAPS & another* 2008 10 BLLR 928 [LC]; *Jiba v Minister : Department of Justice & Constitutional Development & Others* 2010 31 ILJ 112 (LC); and *Trustees For The Time Being of the National Bioinformatics Network Trust v Jacobson & others* (2009) 30 ILJ 2513 (LC) ; as well refer to *Sidumo* above note 180 paras 78-79 read it together with Hoexter's explanation of flexibility in Hoexter C *Administrative Law in South Africa* 363 . It is referred to in chapter two under part 2 2 4 2.

¹⁹⁷ Refer to chapter two 2 2 4 2 on the theory of flexibility and its extent in criminal misconducts discipline.

the widening of the scope of fairness has more advantages than observing a narrow perspective of fairness based on flexibility.

Against the jurisprudential outcry that if employers ought to observe both principles of natural justice, they would be equated to courts that follow formal processes, it is argued that the processes expressing fairness in the wide sense promote an employer and employee relationship that respects all other constitutional rights affecting the nature of the problem in issue.

Within this thesis discussion, the employer's attempt to engage in criminal persecution for disciplinary purposes is a huge responsibility. Within the constitutional mandate criminalisation of individuals has been assigned specific fairness principles including the rights of suspects of crime. The South African Constitution aligns itself with universal observance of fairness in matters of criminal law nature.¹⁹⁸

South Africa is therefore encouraged to explore systems of the United Kingdom, the United States of America and New Zealand which first cracked statutory confinements in law, especially those dividing civil and criminal law. Through that development, these systems enabled the reinterpretation of formal statutory-based criminal actions and identified criteria based on the subject-matter in issue.

They broke away from confining determination of subject matters in criminal proceedings within civil law principles. They enabled the substance of the situation to determine the applicable legal principles.

Through using constitutional transformative principles, South Africa can be able to explore how best to redefine civil and criminal processes from a constitutional interpretative perspective. This approach enables a flexible application of legal principles across board, especially where civil and criminal procedure processes are concerned. For a practical application of

¹⁹⁸See *S v Orrie and Another*, 2005 (1) SACR 63(C) at 69(i) to 70(c) per Bozalek J and read *Makwakwa v The State case no A409/13 South Gauteng High Court, Johannesburg*. Delivered on 24.03.2014. Per Opperman AJ pages 6–8. Also read *S v Sebejan* 19971 SACR 626 (W) and *S v Zuma*, 1995 2 SA 642 (CC). See also *S v Khan* 2010 2 SACR 476 (KZP).

this method, in *Engel v Netherlands*¹⁹⁹ and *Benham v United Kingdom*²⁰⁰ more caution was exercised when dealing with potentially criminal matters. Article 6²⁰¹ of the European Convention on Human Rights was invoked to enable the distinction between classes of investigations not done by law enforcement agencies. That approach encouraged the treatment of investigations of criminal acts different from purely civil matter in those circumstances. Similarly, The United States of America perspective exposed in *Andresen v Maryland*,²⁰² reveals, that the principle in the Fifth Amendment to the United States Constitution stating that: “No person shall be compelled in any criminal case to be a witness against himself,” applies across the board, in criminal and civil proceedings, as long as the suspect or the witness apprehends self-incrimination.

1 6 Research methodology

This is a desktop research-based study where primary and secondary sources of literature regarding fairness in labour law from the South African perspective will be used to frame arguments. This thesis argues against the current interpretation of fairness emphasised in labour law jurisprudential expressions of employer criminal investigations procedures. Commensurately, this thesis also argues against the subsequent dismissal hearings that determine employee criminal suspect’s guilt before dismissal.²⁰³ Since this research is argumentative, it engages in discourse methodology. I have referred to the theories underlying labour law equity. These were found through reading literature in books, articles, case law and listening to audio recordings of court proceedings.

¹⁹⁹ (1976) 1 EHRR 647.

²⁰⁰ (1996) 22 EHRR 293.

²⁰¹ Referred to and explained in chapter five. See chapter five para 5.4.1 on the Privilege against self –incrimination as a human right in the United Kingdom and its application in employment matters.

²⁰² 427 U.S. 463 (1976).

²⁰³ Read *Mahlangu v Cim Deltak*, *Gallant v Cim Deltak*, 1986) 7 ILJ 346 IC at 357–358.

The thesis interlinks labour law and criminal law to come up with justiciable fairness for employees who have committed criminal misconducts. It has found that there are interlinks between constitutional principles of fairness. First it notes that the wide constitutional perspective of fairness demands that sections of the Constitution be interpreted within the wide constitutional mandate. The thesis therefore compares and extrapolates fairness principles within the South African constitutional human rights-based perspective. The thesis argues that the current jurisprudential interpretation of labour law fairness based on the principle of flexibility breeds informal procedural processes which exempts employers from observing important constitutional principles expressed through proportionality-based prescripts. This interpretation jeopardises the rationale of constitutional fairness from a wider perspective expressed in the Preamble, sections 1, 8, 9, 23, 33, 35 read with section 195 of the Constitution. In so doing, it misinterprets the human rights-based rationales of the Constitution. The thesis argues that the flexibility-based approach affects the foundational constitutional principles of fairness in section 23 of the Constitution, it is against the Constitutional demands for the protection of individual rights at all costs except when constitutionally mandated that such rights may be overlooked.²⁰⁴

The thesis therefore recommended that South Africa must draw from the experience of other common law states whose employment law foundations emanate from some similar common law perspectives like South Africa. The intention is to show how these jurisdictions have (regardless of the existence of Master and Servant connotations from common law) managed to overcome the possibility of prejudices emanating from the ignorance of the employee criminal suspect's rights against self-incriminations.

The United Kingdom, the United States of America and New Zealand will be a necessary reference in order to pursue the objective for reinterpretation of fairness in dismissal of employee suspects of criminal misconducts. Apart

²⁰⁴ Per section 36 of the Constitution.

from these states' similar common law background with South Africa, these systems are chosen because they share equivalent rights with South Africa especially the rights to fairness pertaining to criminal suspects and rights to fair labour practices.²⁰⁵ These jurisdictions also observe the protection of human rights, just like South African constitutional transformative perspective in the Preamble, sections 1, 8, 9, 23, 33, 35 read with section 195 seeks to do.

The attempt to show how the United Kingdom, United States of America and New Zealand managed to overcome possibility of prejudices emanating from the ignorance of the employee criminal suspect's rights against self-incriminations needed access to international material. The thesis was written based on electronic resources on both primary and secondary resources addressing South African and international perspectives.

Important websites such as the International Labour Organisation's website were visited. Books explaining the interpretation and application of the fairness principles from South Africa and the chosen international jurisprudence were looked at. Academic articles in journals and other accessible materials were also considered.

It is important to mention that there was scarcity of authority on discipline and misconduct in labour law as this area of research is still limited. This thesis is part of the foundational research in this area of research. To interlink my argument (s), I have cross referenced most influential literature, namely that is cited often, in the footnotes.

1 7 Justification and limitations of research

The foundations of equity underlying section 23 of the Constitution envisage fairness that is higher than lawfulness pursued from the labour law perspective of the common law era. On this basis, the LRA provisions seeking to unpack section 23 of the Constitution mandate, are considered

²⁰⁵ For example, read the explanation of fairness from the American perspective in Backer L C 1997 *Tulsa Law Review* Vol. 33 Iss. 1, Art. 10 135-162.

the instrument of constitutional transformation in labour matters, especially regarding the right against unfair labour practices in section 23(1).

In the aim to move away from inequities of employees and employers identified in the common law era, labour law fairness,²⁰⁶ the current constitutional perspective of fairness is wide. The wide constitutional perspective of fairness expects employers' criminal investigations procedures and subsequent disciplinary hearing processes to be fair. Section 23(1) of the Constitution, entrenching the right to fair labour practices read with the LRA provisions must be interpreted from the wide constitutional perspective of fairness. Thus, the determination of employee's criminal guilt before dismissal ought to observe section 35 of the Constitution amongst other provisions. To such extent the employer's investigation procedures and subsequent hearing for dismissal transform from mere common law lawfulness to a justiciable human rights-based processes.

The thesis argues against the current jurisprudential interpretation of section 23(1), to the exclusion of the second leg of natural justice principles.²⁰⁷ It escalates the Industrial Court equity principles founding section 23 of the Constitution because they observed both principles of natural justice. The Industrial Court equity principles effectively dealt with possible procedural injustices which are now evident in the current application of section 23(1) of the Constitution.

The obvious multiplicity of criminal persecutions within section 23 and section 35 in the Bill of Rights insinuates inequalities against section 9 of the Constitution. The challenges brought to bear by the employers' criminal investigations processes and subsequent dismissal hearing processes in the event that employers ignore the equity principles now entrenched in section 35 of the Constitution, justify that research that investigates the constitutionality of employer processes be carried out.

²⁰⁶ Read, Conradie M 2016 *Fundamina* vol 22 (2) pp 163-204.

²⁰⁷ Including the principles against unfair persecution of criminal suspects.

In the light of such research there will be an exposure regarding whether or not the application of section 23(1) got rid of the inequity controversy regarding labour issues of fair dismissal from common law perspective where the Industrial Court struggled to remedy inequities as there was no Bill of Rights.

The current interpretation of section 23 of the Constitution outside the wide constitutional fairness perspective should be dissected to find if it is aligned with the constitutional perspective of fairness. It is therefore justifiable to conduct research that clarifies whether the current interpretation of fairness is in accordance with the constitutional transformative objectives in the Preamble, section 1, 8, 9, 23, 33, 35 and 195 of the Constitution so as to do away with the draconian processes which were inequity- based common law interpretations.

The research will expose any apparent unconstitutionality in the processes and procedures followed by the employer who investigates and dismisses, and employee suspected of criminal misconducts. The research will propose ways to address any encountered challenges. It will emphasise that draconian common law-based perspective cannot be preferred over a human rights-based constitutional law perspective. It will harness the Industrial Court common law era effort when dealing with criminal misconducts, namely the insistence that natural justice fairness principles were essential, especially the *nemo iudex in propria sua causa*²⁰⁸ principle entailing the right against self-incrimination. It begs the equity-encompassed fairness perspective of the Industrial Courts which eventually founded section 23 of the Constitution.

The Industrial Court equity-based processes urged for the observation of fairness principles, which principles were later adopted in section 35 of the Constitution. The result was that the Industrial Court's perspective of criminal law procedure was opposed to the hearings of cases involving criminal misconduct which defied the common law natural justice principles.

²⁰⁸ No man shall be judged in his own cause also referred to as the rule against bias.

Such hearings meant that there was no fairness for employee criminal suspects. The Industrial Court perspective included the principle that “no statement made by *an accused* person to be given in evidence against himself unless it is shown by the prosecution to have *been freely and voluntarily* made—in the sense that it has not been induced by any promise or threat proceeding from a person in authority.”²⁰⁹

The current LRA fair dismissal approach will be investigated to determine if it entails compromises for employee criminal suspects’ rights in section 35. The fact of the matter is that employees suspected of criminal misconducts who then appear in disciplinary hearings face a hard choice of self-incrimination, if they were not to answer to their charges, then dismissal would still be the ultimate. It will be found out if in this circumstance labour law affords any protection to employee criminal suspects in dismissal hearings.²¹⁰

Contrary to fairness observed in the past era there is still a need to re-interpret the rationale for fair process principles in labour law in the context of constitutional objectives to justice. I agree in this thesis that, “[w]hile the courts have established that the determination of a fair sanction for workplace misconduct necessarily entails a value judgment, they have failed to recognise that principled decision-making requires a coherent conception of justice.”²¹¹ Of significance, labour decisions on fair dismissals on the basis of criminal misconduct ought to be based on judgment taking into account the constitutional value that apply to criminal justice for criminal suspects.

This thesis will help labour law scholars as well as professionals, including the judiciary, to look back and define the constitutional perspectives that should be engaged in the consideration of dismissals of employee criminal

²⁰⁹ formulated in *R v Barlin*, 1926 AD 459 at 462.

²¹⁰ The contract of employment by nature is onerous as far as the employee is concerned. See Manamela T 2013 SA *MERC LJ* 418. He relates the complexity and difficulty that the employee could be possibly faced with in discerning the reasonableness of the employer’s call for action from employee.

²¹¹ van Niekerk A 2012 *Acta Juridica* 102, 105.

suspects. The thesis will put a halt to the misuse of labour processes, further, to find justice in matters of a criminal law nature. Most of all, it will emphasize the need to do away with the current unconstitutional dichotomy between civil and public laws. This research endeavour encourages that the nature of the matter determines the principles to follow. It does not encourage classification of the form of a matter according to whether it is a civil or a public matter. Furthermore, it exposes such an approach to be focussing on the form as opposed to the substance of the matter.

1 7 1 Limitations of research

This research interlinks public and private law principles. There is, however, little academic research from the South African perspective amalgamating perspectives of criminal or public law and civil or private law. The shortage of academic material in this area remains a challenge when research interlinking public and private law is undertaken in the thorough going fashion as this thesis does.

At the inception of the Constitution in South Africa, a new perspective emerged that seeks to amalgamate all law disciplines from a human rights-based approach mandating a new legal dichotomy within which the current research falls.

This is a postmodernist²¹² approach writing criticising, comparing, analysing and merging the current concepts and philosophies to come up with new interpretation of fair dismissal of employee criminal suspects. The thesis therefore states existing principles of fairness without delving into what the current writing and theorisation explains but focuses on their application to expose the loopholes in literally applying such understanding on the new concept of criminal misconduct. The thesis comes up with suggestions on how to reinterpret the current principles in order to advance fairness on

²¹² Postmodernism also spelled post-modernism, in Western philosophy, a late 20th-century movement characterized by broad skepticism, subjectivism, or relativism; a general suspicion of reason; and an acute sensitivity to the role of ideology in asserting and maintaining political and economic power.

employee criminal suspects. It uses the current principles to come up with a merger of principles to address hypothesised challenges. This approach is intending for a new understanding and application of existing principles and has delved in dry areas of legal discourse where there is just a little and possibly no research existing.

It was discovered that there is lack of literature both nationally and internationally that speaks from the same perspective as the hypothesis in this thesis. It was hard to discover a variety of scholars who speak from the same understanding hypothesised in this thesis hence in most cases a single resource was referred to in order to express arguments in this thesis. This thesis forms the breaking ground towards the new study on species of misconducts in labour law. It has dealt with only one specie-criminal misconduct. It has discovered that the investigation and discipline of employee misconducts may draw from several areas of law. Thus, several disciplines of law are brought together to try and amass the employer's discretion even though such disciplines' perspectives and controls- like criminal law principles are not strictly observed by the employer because the employer operates within massive flexible means of operation. The employer is free from the concerned discipline protective measures which could benefit the employee.

This research has therefore become possible through a consultation of research in compartmentalised disciplines of legal principles. At the centre was an understanding sought from research in human rights discussing and interpreting the Bill of Rights in the South African Constitution. At the inception of the South African Constitution, the Bill of Rights became the centre for legal interpretation.

Amongst other rights in the Bill of Rights, the application of the right against self-incrimination—which was viewed as a criminal law prescript—was

applied indiscriminately between criminal and civil matters.²¹³ Based on the new rights-based perspective, written material in current compartmentalised disciplines of labour law and criminal law was examined in the light of the Bill of Rights. International research that dealt with relevant international law concepts and explained the application of similar clauses as those entrenched in the South African Constitution were found useful. It is however sad to note that there is no specific International Labour Organisation Convention that deals with issues of discipline. This encounter has made the research in this area very challenging. There was limited legal sources to refer to in expressing the international perspective on discipline of employees who committed crimes as misconducts. The examples drawn from other commonwealth states focus on the right against self-incrimination. This right is both observed in South Africa and internationally. It was applied under common law as privilege. South Africa emancipated it into a right cross cutting fairness in matters of a criminal law nature. Foreign law emancipated it into a right that applies in both civil and criminal law matters including employment law. Principles relating to its formation, namely the principles of natural justice formed the basis of discourse in this thesis. They were also helpful in deciphering the nature of justification sought by the ILO in disciplinary issues. Such justification was also discovered to be the same as constitutional justification sought in South Africa.

The concerned literature was however not rich enough even though it was foundational to the area of disciplinary processes pertaining to employee criminals central to this thesis. To overcome the possible challenges, I have identified the common law concept of self-incrimination to show that it is possible that employees right against self-incrimination can be invoked in employment matters. Within the current jurisprudence self-incrimination is

²¹³ See *Ferreira v Levin N O & Others* 1996 (1) SA 984 (CC) at paragraph 96. In the case of *S v Krcir and Others* 2016 (2) SACR 214 Per Lamont J in his trial within trial decision and referring to; *Black v Joffe* 2007 (3) SA 171 (CPD), held that, "The privilege which the witness has is not limited to criminal or civil trial proceedings."

a concept which underlie fairness principles in criminal punishment within the South African Common law²¹⁴ and the entrenched section 35 of the Constitution.²¹⁵ In South African labour law the invocation of this right is negated. The right against self-incrimination has currently been incorporated in civil punishments including labour law discipline processes by the European Union.²¹⁶ Some of the Commonwealth states which share common law with South Africa are part of the European Union and will be invoked in terms of section 39 of the South African Constitution, to show that it is possible that South Africa can bridge the divide between criminal and labour law dealing with the investigation and hearings for dismissal of employees suspected of criminal misconducts.²¹⁷ The main reason for the development recognised in these Commonwealth states was to strike fairness in employer investigations for dismissal of employees who have committed crime. Such criminal acts are termed “criminal misconducts”²¹⁸ in this thesis.

1 7 2 The scope of the study

This thesis focuses on the labour law principles empowering the employer’s criminal investigations and disciplinary hearings involving employees who are alleged to have committed criminal misconduct. In the light of entrenched fairness principles for criminal suspects, it examines the application of principles informing the employer’s duty to furnish fair reason for employee criminal misconducts suspects. It looks at how the employer’s conduct of disciplinary hearings with the aim to dismiss an employee who committed some criminal misconduct respects constitutional objectives of

²¹⁴ Pittman C R *The Colonial and Constitutional History of Privilege* 71.

²¹⁵ Theophilopoulos C 2002 *SAJHR* 505.

²¹⁶ See Article 6 of the European Convention on Human Rights (ECHR).

²¹⁷ See chapter five showing how other common law countries like South Africa are dealing with this challenge. The United States of America, New Zealand, and the United Kingdom consider the employee criminal suspect’s right against self-incrimination even in employer criminal investigation and subsequent dismissal hearings.

²¹⁸ Read paragraphs 2 1 1 on the concept of criminal misconducts and 2 1 1 1 on the definition of criminal misconducts in labour law.

fairness and justice in the Preamble, section 1, 8, 9, 23, 33, 35 read with section 195 of the Constitution. It emphasises the extent to which the employers should respect constitutional equity-based rationales founding the constitutional principles of fairness in carrying out their criminal investigations and dismissal hearings involving criminal misconduct as informed by the LRA flexible and informal prescriptions.

This thesis is based on desktop researched material. Websites with relevant information were consulted. Journals and books from libraries were referred to. In turn, ideas gathered from reading materials, where some opinions ensconced in this thesis were considered, were tested at relevant conferences through presentations.²¹⁹ The study focuses on individual law principles of fair labour practices entrenched in section 23(1) of the Constitution, in particular the right to fair dismissal. It deals with fairness within the scenario where an employee who is suspected of committing a criminal act is investigated and then undergoes a dismissal hearing where the extent of criminal guilt is determined before dismissal. It is based on South African Jurisprudential interpretation of the right to fair dismissal. The thesis examines the application of principles informing the employer's duty to furnish fair reason regarding the dismissal of criminal suspects. It looks at how the employer's conduct of disciplinary hearings respects constitutional transformative objectives and entrenched constitutional fairness principles for matters of a criminal law nature. In particular, the thesis emphasises the extent to which the employer in carrying out the mentioned section 23(1) mandates informed by LRA respects constitutional rationales of equity founding section 23(1) and operationalised by the LRA principle of fairness.

1 8 Summary of Chapters

This thesis consists of six chapters. Chapter one is the general introduction. It refers to the Industrial Court jurisprudence as the historical foundations of

²¹⁹ A pioneer presentation was done at the UNISA's 20 Years of the Constitution of the Republic of South Africa: Looking Back, Thinking Forward, conference.

section 23 so as to bring to view section 23 “equity” rationale. It exposes that equity from the common law Industrial Court jurisprudence is the foundation for section 23(1) fair labour practice rights. Chapter one expresses the interrelationship between section 23(1) of the Constitution and the fairness provisions in the Bill of Rights as well as the Preamble, sections 1, 8, 9, 33, 35, 39 and 195. It considers that the constitutional interpretation of section 23(1) is ought to encapsulate constitutional transformative objectives in the Preamble, section 1, 8, 9, 33, 35, 39 and 195. It appreciates how the ignorance of common law natural justice principles of fairness²²⁰ read with that of just cause breeds problems encountered in the current jurisprudential interpretation of fairness in cases of dismissals based on employee criminal misconduct. Based on the application of section 23(1), read in tandem with the LRA interpretation, chapter one shows that the current jurisprudential interpretation of dismissal law regarding the employer’s criminal investigation and hearing of dismissals of employee criminal suspects does not effectively express the constitutional rationale for fair investigative procedures and fair hearing process anticipated in matters of criminal law nature. Further, the chapter gives the aims of the study. It explains the extent and limits of the study. It shows how the work will be arranged and provides a chapter break down with brief summaries on the objective of each chapter.

Chapter two explains the theoretical underpinnings of employer power during the disciplinary processes involving employee criminal-suspects²²¹ from a South African labour law perspective of progressive discipline. It lays a basis for exposing whether the currently followed employers’ criminal investigative procedures and disciplinary hearing processes, with specific

²²⁰ The *nemo iudex in propria sua causa* meaning that no man shall be judged in his own cause, also referred to as the rule against bias. Equity that the Industrial Court-based jurisprudence relied on is in essence the appreciation of natural justice principles read with just cause principles.

²²¹ See section 35 of the Constitution entrenching the right to fair trial in criminal matters. Read it with *S v Orrie and Another*, 2005 1 SACR 63(C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56. As well, see Harris D 1967 ICLQR 354.

reference to dismissal of employees who committed criminal misconducts, express the constitutional mandate for the fair treatment of employee criminal suspects.²²² It unpacks the rationale behind the South African labour law employer disciplinary powers on employees who committed criminal acts. It starts by exposing the philosophical understanding underpinning work environment discipline. It then articulates the evolution of employer disciplinary processes. It exposes procedural disparities between the treatment of employees suspected of criminal misconducts within section 23(1) fair dismissal processes and that of ordinary criminal suspects in the light of section 35 entrenched fairness principles.

Consequently, it discovers that, even though with the same objective of seeking to condemn criminal behaviour, there is a clash between fair procedure rights in matters of a criminal law nature and labour law fairness procedure for employee criminal suspects. Chapter two further exposes that the investigation and disciplinary processes against the employee who has committed a criminal act, although aimed at determining the ultimate criminal liability, are closely linked to subsequent criminal trial proceedings. Chapter two consequently shows that, such proceedings have a potential of successive impact on the employee criminal suspect's rights.

Chapter three looks at the jurisprudential expression of the nature of labour law fairness. It compares it with the nature of constitutional fairness principles established for dealing with matters of a criminal law nature.²²³ Based on the fact that the Administrative Justice Act 3 of 2000 (the PAJA) is the umbrella legislation for administrative justice, including the employer's exercise of powers,²²⁴ chapter three also studies the nature of labour law fairness in the light of the principles of fairness understood from sections 33 of the Constitution entrenching administrative justice principles.

²²² Entrenched in chapter 2 of the Constitution's Bill of Rights. In particular section 35 of the Constitution which adopted proportionality-based perspectives.

²²³ Section 35 of the Constitution read with the CPA.

²²⁴ See *Sidumo* above note 180 paras 78-79.

Chapter three further analyses the extent of fairness encapsulated in labour law jurisprudence on matters of a criminal law nature, deriving such a measure from section 35 constitutional fairness principles intended for a criminal justice perspective. It exposes the inequalities transpiring when dealing with criminal misconduct suspects within the labour law jurisprudential parameters. It answers the question whether labour law disciplinary processes for employee criminal misconduct suspects observe the established section 35 constitutional requirements of fairness associated with criminal suspects. Likewise, it proceeds further to study fairness processes in labour law in the light of proportionality and flexibility theories.

Furthermore, chapter three reveals a discrepancy: while criminal justice fairness relies greatly on the principle of proportionality, labour law disciplinary perspective on fairness leans towards the principle of flexibility. From these revelations, it divulges that in the light of constitutionally entrenched fairness principles for suspects of crime, the employers' criminal investigations pertaining to employees that are suspected of criminal misconduct and their subsequent disciplinary hearings for dismissal, in effect border on unconstitutionality. It is in effect a measure of unfairness. The conclusion drawn from chapter three revelations is that the employer criminal investigations and subsequent disciplinary hearings do not express constitutional fairness entrenched in the Constitution Bill of Rights for matters of criminal law nature. If anything, such investigations and hearings bear inequalities between the employee criminal suspects and other criminal suspects. This is against section 9 of the Constitution.

Against the chapter background outlined in chapter three, chapter four discovers that the adoption of the principle of implied breach of trust between employer and employee emanating from common law²²⁵ now encapsulated in jurisprudential underpinnings of dismissal hearing

²²⁵ Discussed in chapter two at para 2 2 4 1 dealing with the theory of proportionality and its extent of application in criminal misconduct discipline.

processes—promotes the idea that the employer has flexibility in determining disciplinary hearing processes. It addresses the condition that the LRA disciplinary hearing processes for dismissal of employees who committed criminal misconducts do not observe criminal procedure based on section 35 entrenched fairness principles, even though dealing with matters of criminal law nature.

chapter four goes further to show that, while employers feel not bound by the prescripts of criminal justice, they lose sight of the holistic application of constitutional objectives demands.²²⁶ As a result of this fault, employers discount the relevance of section 35 of the Constitution regarding the treatment of employees, who are alleged to have committed criminal misconduct, as criminal suspects. Ultimately, the chapter discloses that the extent of employer criminal investigative and subsequent disciplinary hearing processes is informal, and disregard formal processes prescribed in the CPA. Chapter four discloses that the informal employer disciplinary hearing goes against the essentialities of proportionality mandated in matters of a criminal law nature.²²⁷ It concludes that non-observance of proportionality culminates in multiple injustices for employees subjected to employer criminal investigations and the subsequent disciplinary hearings. Through illustrations derived from recent case law dealing with criminal misconduct dismissals, chapter four discovers procedural dilemmas caused by disunity between criminal and civil labour law. It provides for a glimpse of labour law related cases to illustrate the legal predicaments ensued by the separateness of labour law and criminal law processes dealing with employee criminal suspects dismissals on matters of a criminal law nature. Chapter five explains the approaches adopted in three jurisdictions: The United States of America; New Zealand and United Kingdom when dealing with criminal misconduct dismissals. It shows that in these jurisdictions, the negation of the principle against self-incrimination is rejected and employer

²²⁶ Entrenched in section 35 of the Constitution.

²²⁷ Explained in chapter two.

criminal investigations and disciplinary hearings must respect the fairness principles engaged in matters of criminal law nature. Chapter five gauges the South African perspective of fair dismissal for employees who committed criminal misconduct (discussed in chapters two and three) against these three jurisdictions' perspectives. Chapter five, further explains that, even though these jurisdictions are also common law countries, they have advanced legal development and now operate in a perspective that is different from the current South African labour law perspective when dealing with criminal suspects investigations and dismissal processes involving employees.

Chapter six is the general conclusion. Further, it recommends a change of perspective, based on the identified loopholes in the South African interpretation of fair dismissal for employee criminal suspects. Instead of a narrow focus currently emphasised in our jurisprudence, a wide interpretation that covers a broader spectrum of involved employee criminal suspects rights is encouraged. Safeguarded processes for investigation explained in chapters two, three, four and five are encouraged in order to satisfy justiciability of criminal misconducts condemnations.

Chapter Two

Concepts and philosophies underlying investigation procedures and disciplinary hearing processes for employee criminal misconducts in South African labour law

2 Introduction

Misconduct is an illegal occurrence that could be explicated as a breach of social contract between the party in possession of a system of rules and a subsequent agent in action within such a system. Thus, misconduct suggests two positions; that of an establishment and that of an agent.

The generic application of the term thus is contextual as per each instance of an institution. For example, a family as an institution can posit a misconduct of breaking curfew for children, a state can posit a misconduct of assault, while an enterprise can postulate theft as a misconduct.

Such an action of breach of contract that occurs in the employment domain susceptible to criminal procedure, as a dishonesty, is an instance of misconduct. Where for instance the employer who seeks to prove it violates human rights; where evidence has to be collected and no procedure like that established in the CPA and section 35 of the Constitution can be followed to prove such an occurrence.

In the absence of both national and international ordinances which precisely distinguish such misconduct, I choose to term it criminal misconduct. In the context of servitude or labour, the terming of these criminal occurrences as dishonesty enables establishments to shy away from applying the approach of proportionality within the CPA and section 35 guidelines for criminal persecution. Employers lean on flexibility in their investigations and subsequent hearings.

The employer's criminal investigative procedures and the disciplinary hearing processes based on criminal misconducts are part of the process

of discipline adopted in a work environment.²²⁸ The process of discipline is embedded in the terms of employment contracts containing agreements between employer and employee.

To this extent, employment agreements are expressions of institutional policies bearing rules aimed at achieving institutional objectives.²²⁹ The ensued South African labour law perspective will expose that disciplinary rules in work environments are influenced by common law,²³⁰ statutory demand²³¹ and constitutionally entrenched principles.²³²

This chapter explains the theoretical underpinnings of employer power to discipline employees' criminal suspects²³³ from a South African perspective. The aim is to lay a basis for exposing whether the criminal investigative procedures and disciplinary hearing processes currently followed by employers, with specific reference to the dismissal of employees who committed criminal misconducts, express constitutional mandate for the fair treatment of criminal suspects.²³⁴

The chapter unpacks the rationale behind the South African labour law as it applies to employer disciplinary powers over employees who are suspected of having committed criminal acts. It exposes employee criminal misconducts as species of matters of criminal law nature. The chapter

²²⁸ See Grogan J *Dismissal* (2018) at 321-322 as well, read *Hillside Aluminium (Pty) Ltd v Mathuse* 2016 37 ILJ 2082 (LC).

²²⁹ See *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU & another* (1998) 19 ILJ 1481 (LC) and *Highveld District Counsel v CCMA* (2003) 24 ILJ (LAC) para [15]. As well, read Grogan J *Dismissal* (2018) at 333.

²³⁰ Read the cases of *Toyota South Africa Motors (Pty) Ltd v Radebe & others* 2000 3 BLLR 243 (LAC) and *Paper, Printing Wood and Allied Workers Union v Pienaar NO and Others* 1993 4 SA 631 (AD) at 638G. In addition, read cases of *Woods v W.M Car Services (Peterborough) Ltd* [1981] ICR 666 and *Courtaulds Northern Textiles Ltd v Andrew* 1979 IRLR 84. As well, read Reynolds F 2015 ILJ 262.

²³¹ Section 23 of the Constitution read with Chapter VIII of the LRA and schedule 8 provisions. With regards to the right to fair dismissals sections 185, 186 and 188 are relevant.

²³² The Constitution of South Africa, 1996. Also read sections 23, 8, 9, 33, 35, 39 and 195 of the Constitution and the Preamble.

²³³ See section 35 of the Constitution entrenching the right to fair trial in criminal matters. Read it with *S v Orrie and Another*, 2005 1 SACR 63 (C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56. Read, Harris D 1967 ICLQR 354.

²³⁴ Entrenched in chapter 2 of the Constitution. In particular section 35 of the Constitution.

expounds on flexibility and proportionality as approaches underlying the exploration of employee criminal misconducts. It discusses the rationale of South African constitutional fairness in its application on matters of criminal law nature. It exposes that flexibility and proportionality are philosophies that underlie fairness. It discusses constitutional rationality and its relevance to the criminalisation and punishment of matters of criminal law nature.

To do that, it exposes the philosophical understanding underpinning work environment discipline. It articulates the evolution of employer disciplinary processes. It goes on to reveal procedural disparities between the treatment of employees suspected of criminal misconducts and that of ordinary criminal suspects in the light of section 35 entrenched fair trial principles. Thus, it discloses the ensuing clash between fair procedure rights in matters of a criminal law nature and labour law fairness procedure for employee criminal suspects. This becomes apparent in the employers' relentless pursuit of one objective of condemning criminal behaviour. The investigation and disciplinary processes against the employee who is suspected of having committed a criminal act, although not aimed at determining the ultimate, are closely linked to subsequent criminal trial proceedings and therefore have a potential of successive impact on the employee criminal suspect's rights.

2 1 The concept of an employee criminal suspect

The common law principle of implied breach of trust between the employer and the employee, amongst others, requires that employees are trustworthy and not dishonest to their employers.²³⁵ It is submitted that due to this central requirement, the contract of employment is considered a unique type of contract which has its basis on trust and without any compromises for

²³⁵ See cases of *Woods v W.M Car Services (Peterborough) Ltd* (1981) ICR 666 and *Courtaulds Northern Textiles Ltd v Andrew* (1979) IRLR 84. As well, read Reynolds F 2015 ILJ 262.

dishonesty.²³⁶ Court decisions have confirmed the importance of honesty for the existence of employer and employee contract. In the case of *Standard Bank SA Limited v CCMA & others*²³⁷ it was held that it is fundamental in employment relationship that the employer should be able to place trust in the employee. In addition, the case is investigated if the employee breaches the needed trust through dishonesty, and the essence of the relationship fractures. Thus, dishonesty is destructive to the employer employee relationship.

The employer trusts that the employee will be honest and perform duties honestly while the employee trusts that the employer will pay for the work done in terms of the employment contract. Labour law Jurisprudence²³⁸ has shown that if the employee is dishonest in any manner, that is a fundamental breach which may lead to the employer repudiation of the contract. The fundamentals of different acts of dishonesty by the employee attract different reactions from the employer from act of suspending the employee to that of dismissing the employee.

In the case of *De Beers Consolidated Mines Ltd v CCMA & others*²³⁹ it was observed that “the seriousness of dishonesty [namely,] whether an act can

²³⁶ *Standard Bank SA Limited v CCMA & others* 1998 6 BLLR 622 (LC) para 39. Newaj K 2016 *THRHR* 429-442 writes on the effects of dishonesty on employer and employee contract. In this article it is shown that employee dishonesty affects the trust between employer and employee and therefore calls for harsh responses from the employer. The employer would consider if to keep the employee or dismiss the employee. Of interest is the employer interests. This approach is different from the current commonwealth approach where the duty of good faith has widened the trust and confidence principle to the extent that even the impending employee criminal suspect's rights such as the right against self-incrimination are ought to be considered. This approach has brought a new balance still missing in South African labour law fair dismissal. See *Sharpe v Chief of the New Zealand Defence Force ERA Auckland AA 101/10*, 4 March 2010 which held against employee's forced participation in employer investigation on the basis that employee owes employer trust. It embedded the duty of good faith in a wider scope than the common law implied duty of trust and confidence.²³⁶ See Goddard J 2011 *Canterbury Law Review* 251-282, at 261.

²³⁷ 1998 6 BLLR 622 (LC).

²³⁸ *SAPPI Novoboord (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at para 7; *Nedcor Bank Ltd v Frank & others* 2002 7 BLLR 600 (LAC) at pa 39; *De Beers Consolidated Mines Ltd v CCMA & others* 2000 ILJ 1051 (LAC) at 1058I-J.

²³⁹ 2000 ILJ 1051 (LAC) at 1058I-J.

be stigmatised as gross dishonesty or not, depends not only, or even mainly, on the act of dishonesty itself but on the way in which it impacts on the employer's business."²⁴⁰ In most cases the commission of criminal acts stipulated in schedules I to III of the CPA²⁴¹ within the employment environment affects the trust between employer and employee to the extent that the employer dismisses the employee.

It is therefore submitted that the employee who is suspected of committing schedules I to III of the CPA criminal acts commits a fundamental dishonesty. Such employees are therefore termed employee criminal suspects in comparison with criminal suspect within the criminal procedure. It submitted that it is this category of employees who are subjected to an investigation analogous to criminal investigation by the employer in preparation for a disciplinary hearing to establish their guilt before dismissal. This thesis therefore categorises employees who commit dishonesty based on the commission of the acts in schedules I to III of the CPA as employee criminal suspects. They are named after criminal suspects in criminal law who are persons suspected of committing amongst others acts in schedules I to III of the CPA.

2 1 1 The concept of criminal misconducts

The term *criminal misconducts* is a term devised in this thesis to refer to criminal acts of dishonesty committed by employees and in turn having negative impacts on their employment relationship with their employer.²⁴² Concisely such acts are those, which if followed by criminal proceedings would have a criminal punishment outcome.²⁴³ In terms of the South African public law, such acts constitute schedules I to III crimes of the CPA.²⁴⁴ They

²⁴⁰ Act 51 of 1977.

²⁴¹ Act 51 of 1977.

²⁴² Act 51 of 1977.

²⁴³ Williams G 1955 CLP 107 at 130.

²⁴⁴ Act 51 of 1977.

range from minor acts of theft and increases in scale to more severe crimes such as racketeering.

2 1 1 1 The definition of criminal misconducts in labour law

The LRA does not directly interpret criminal misconducts.²⁴⁵ In section 3 intended for the general interpretation of the Act, it identifies acts of misconduct for purposes of dismissal. It then distinguishes between two classes of focus, namely, minor misconducts and serious or gross misconducts.²⁴⁶ Gross misconducts are directly dealt with in section 3(4) of the LRA. According to the LRA, gross misconducts cover all acts of dishonesty.²⁴⁷

From the general wording of the LRA, it is not easy to unpack what species of misconduct fall under gross misconduct without seeking help from the literal interpretation of the meaning of the word dishonesty. On the one hand, *The Longman Active Study Dictionary*²⁴⁸ describes the term dishonesty as a noun to the adjective, dishonest. Dishonest means likely to lie, steal, or cheat. On the other, *The Oxford English Dictionary*²⁴⁹ adds to the list of meanings and describes dishonest to mean not honest, not

²⁴⁵ Criminal misconduct is a term devised in this thesis. There are hardly any scholars who wrote on criminal misconducts.

²⁴⁶ See section 3 of the LRA.

²⁴⁷ The LRA, can be read as differentiating between minor misconducts and serious misconducts even though it does not specify types of misconducts for each class. It can be read to be attempting to generalise gross misconducts in section 3(4) which in relevant part reads;

“Dismissals for Misconduct

.... Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.”
(added emphasis)

It is explicit in these words that misconducts of a criminal nature are falling under serious misconducts because amongst criminal acts are acts of dishonesty. These include theft, fraud and so on and so forth.

²⁴⁸ _____ *Longman Active Study Dictionary* (Pearson Education Limited Edinburgh Gate 2005) 208.

²⁴⁹ Soanes C (ed) *Oxford English Mini Dictionary* 7 (ed) Oxford University Press, UK (2007) 158.

sincere, or trustworthy. Shedding further light, *The Online free dictionary*,²⁵⁰ interprets dishonesty, as deceitfulness shown in someone's character, or behaviour. It then lists the following words as describing acts of dishonesty; "deceit, deception, duplicity, lying, falseness, falsity, falsehood, untruthfulness; fraud, fraudulence, sharp practice, cheating, chicanery, craft, cunning, trickery, artifice, artfulness, wiliness, guile, double-dealing, underhandedness, subterfuge, skulduggery, treachery, perfidy, unfairness, unjustness, improbity, rascality, untrustworthiness, dishonour, unscrupulousness, corruption, criminality, lawlessness, lawbreaking, misconduct"²⁵¹

While informed of the literal meaning to the word 'dishonesty', it is not yet clear what dishonesty means in legal terms.

There is still a hanging question as far as the current thesis is concerned. It is trite to question as to whether dishonesty in criminal law means something different from dishonesty in labour law. The answer to this question is enquired from labour law literature dealing with misconducts based on dishonesty.²⁵² A few of these from a labour law perspective are consulted. Thomas and Benjamin²⁵³ amongst others likened dishonesty to theft. They are of the opinion that an employee entrusted to keep guard of employer's money would be so trusted at the reliance of the employer that the employee would not "steal."²⁵⁴ According to them, for an employee to

²⁵⁰ *The Oxford English Mini Dictionary* <http://www.thefreedictionary.com/dishonesty> [accessed on the 15 April 2018].

²⁵¹ *The Oxford English Mini Dictionary* <http://www.thefreedictionary.com/dishonesty> [accessed on the 15 April 2018].

²⁵² Refer to Govindjee A and van der Walt A (eds) *Labour Law in Context* (2017) 137-147 at 139; Grogan J *Dismissal* (2018) at 272-273. As well read cases of *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at 784-786 and, *Standard Bank of SA Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 903 (L C) at 913D as well as *Metcash Trading Ltd t/a Metro Cash and Carry v Fobb and Another* (1998) 19 ILJ 1516 (L C).

²⁵³ Thompson C and Benjamin P *South African Labour Law* 2009 AA1-430.

²⁵⁴ Thompson C and Benjamin P *South African Labour Law* 2009 AA1-430. Also see *Central News Agency v CCAWISA & Another* 1991 12 ILJ 340 (LAC); [2006] 3 BLLR 234 LAC and *SATAWU obo Sefara v Metrorail Services Pretoria* 2001 22 ILJ 2379 (ARB).

be said to have stolen items from the employer, the items must not have been thrown away as waste.²⁵⁵

In accordance with Thomas and Benjamin²⁵⁶ are Tryon and Kleiner,²⁵⁷ who explain employee theft in the most basic terms. Specifically, they associate categories of employee theft to a broad spectrum of what transpires in different employment systems. Their explanation exposes that the type of work involved varies the nature of employment theft.²⁵⁸ Thus, retail theft is within merchandising environment such as grocery stores; discount departments and small retail business. Petty theft involves the stealing of office supplies and petty cash. It is another category of theft associated with big and corporate businesses.²⁵⁹ According to them,²⁶⁰ larger thefts involve stealing of office equipment such as office machinery including computers, printers and high value test equipment. There is also stealing of intangible things, for example, “padded travel expense reports and inflated employee morale functions as well as long lunches and break periods including work slowdowns, inferior workmanship and timecard mischarging.”²⁶¹

From their explanation, it is discerned that employee theft is constituted by acts involving the taking of cash, inventory, information or other assets from the business or the company without permission²⁶². It is also understood that acts of thefts associated with embezzling funds fit the basic definition within the CPA.²⁶³ In the same manner as authorities in criminal law,²⁶⁴ they reckon that the greater magnitude of embezzlement acts throws them into

²⁵⁵ Thompson C and Benjamin P *South African Labour Law* 2009 AA1-430. As well see, *Qumsa & Others /Shoprite Checkers* (2001) 5 BALR 505 (CCMA).

²⁵⁶ Thompson C and Benjamin P *South African Labour Law* 2009 AA1-430.

²⁵⁷ Tryon G Kleiner B H 1997 *MAJ* 20.

²⁵⁸ Tryon G Kleiner B H 1997 *MAJ* 20.

²⁵⁹ Tryon G Kleiner B H 1997 *MAJ* 20.

²⁶⁰ Tryon G Kleiner B H 1997 *MAJ* 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

²⁶¹ Tryon G Kleiner B H 1997 *MAJ* 20.

²⁶² Tryon G Kleiner B H 1997 *MAJ* 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

²⁶³ Tryon G Kleiner B H 1997 *MAJ* 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

²⁶⁴ Tryon G Kleiner B H 1997 *MAJ* 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

a classification higher than theft but fraud.²⁶⁵ Further, they observe that the techniques to detect both theft and fraud types of crime are the same although the investigation could bear some differences.²⁶⁶

They associate these differences to the magnitude of the funds involved and the types of employee perpetrators. According to them, the difference in the magnitude of investigation remains the same whether the investigation is in private law or public law.²⁶⁷ The investigating personnel may also differ in the case of theft investigations as opposed to fraud investigations.²⁶⁸

It is trite to argue here that Thomas and Benjamin ²⁶⁹ as well as Tryon and Kleiner²⁷⁰ have in both instances managed to offer a cogent explanation of what constitute acts of crime within the ambit of employment law in South Africa. Theft and fraud crimes, for example, venture as grounds for employee dismissal in South African labor law. In *Metcash Training Ltd t/a Metro Cash and Carry v Fobb & Another*,²⁷¹ the court emphasised that theft is theft regardless of the value of an item taken. Prior to the Metcash decision, in the case of *Anglo-American Farms t/a Boschendal Restaurant v Komwayo*,²⁷² the employee who was a waiter appeared before court on a charge of taking a can of Fanta (cola) without permission. The employer had found the employee guilty of misappropriation of company property amounting to theft. The employee was dismissed from employment before seeking the Industrial Court's intervention.

²⁶⁵ Tryon G Kleiner B H 1997 MAJ 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

²⁶⁶ Tryon G Kleiner B H 1997 MAJ 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

²⁶⁷ Tryon G Kleiner B H 1997 MAJ 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

²⁶⁸ Tryon G Kleiner B H 1997 MAJ 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

²⁶⁹ Tryon G Kleiner B H 1997 MAJ 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

²⁷⁰ Tryon G Kleiner B H 1997 MAJ 20; Thompson C and Benjamin P *South African Labour Law* AA1-430.

²⁷¹ *Metcash Training Ltd t/a Metro Cash and Carry v Fobb & Another* (1998) 19 ILJ (LC)

²⁷² (1992) 13 ILJ 573 LAC.

Labour law Jurisprudential interpretations of dishonesty in South African labour law relate dishonesty to various forms of gross misconducts including theft,²⁷³ fraud,²⁷⁴ misrepresentation,²⁷⁵ assault,²⁷⁶ abusive language,²⁷⁷ drug use,²⁷⁸ sexual harassment²⁷⁹ and many more. These acts are concise to acts constituting schedules I to III of the CPA.²⁸⁰ In both public and private law, it is mandatory that any person who commits these acts is punished. From a labour law perspective, if an employee performs these Acts²⁸¹ it triggers the employer's initiative to discipline the employee criminal suspect.

2 1 1 2 The International Labour Organisation perspective on discipline for criminal misconduct

There is no direct ILO convention dealing with discipline of misconducts.²⁸² The same situation applies for dismissal of employees based on criminal misconduct. It is therefore of importance to source the ILO perspective of discipline for criminal misconducts from the way ILO treats its own employees.

The ILO has its own internal standards for terminating employees' contracts of employment. Specific to our topic, the *Termination of Employment Recommendation, No. 166 of 1982* is important to the extent that it deals

²⁷³ *Anglo American Farms t/a Boschendal Restaurant v Komwayo* 1992 13 ILJ 573 LAC.

²⁷⁴ *De Beers Consolidated Mines Ltd v CCMA* 2000 9 BLLR 995 (LAC); *Fipaza v Eskom Holdings Ltd and Others* (JR 2220/08) [2010] ZALC 66; 2010 31 ILJ 2903 (LC) (6 May 2010) *Fipaza N P v Eskom Holdings LTD & Others*; *Eskom Holdings Ltd v Fipaza and Others* (JA 56/10) [2012] ZALAC 40; 2013 4 BLLR 327 (LAC); 2013 34 ILJ 549 (LAC); *Absa Makelaars (Edms) Bpk v Santam Versekeringsmaatskappy Bpk & another* 2003 24 ILJ 1484 (LC) . As well, read Keller S K and Harris M P 2005 *Journal of Contemporary Criminal Justice* 6.

²⁷⁵ Thompson C and Benjamin P *South African Labour Law*, 2009 AA1-430.

²⁷⁶ *Adcock Ingram Critical Care v CCMA & others* (2001) 22 ILJ 1799 (LAC).

²⁷⁷ *AAUSA on behalf of Ncube v Northern Crime Security CC* (1999) 20 ILJ 1954 (CCMA).

²⁷⁸ *Prince Club v CCAWUSA* (1988) ARB 8.11.5. As well see *Kleinkopje Colliery/NUM obo Mabane* [2001] 12 BALR 1289 (AMSSA).

²⁷⁹ *Ngantwini/Daimler Chrysler* [2000] 9 BALR 1061 (CCMA).

²⁸⁰ Act 51 of 1977.

²⁸¹ Schedules I to III acts encompassing labour law acts of dishonesty.

²⁸² Miyake S *Discipline Issues in ILO Standards: Meet with the Court*, Symposium 2018 <https://industrialcourt.org.tt/media-centre/presentations/category/17-meet-with-the-court-symposium-6> [accessed 07/05/2019].

with termination of employee's contract based on misconduct. The *Termination of Employment Recommendation, No. 166 of 1982* is read together with the *Termination of Employment convention, No. 158 of 1982*.²⁸³ In terms of paragraphs 7-13 of the Recommendation No.166 the employer must warn the employee who committed a misconduct.

The ensued ILO processes fit into progressive discipline perspective also practiced in South Africa.²⁸⁴ In accordance with the ILO dismissal processes, upon reaching the decision to terminate the employee's contract through dismissal, the employer must give the employee reasons for the decision to terminate the contract.²⁸⁵ Within this perspective the need for employer to warn an employee before deciding to dismiss the employee, implies that it is unprocedural for the employer to terminate employee's contract without warning.²⁸⁶ Warning the employee is expressed as integral to the employer disciplinary processes and as a measure for protecting the employee from unfair dismissal.²⁸⁷ Warning expresses the progressive discipline approach where in effect not a single warning would qualify dismissal of an employee. In order to establish a valid reason for dismissal,

²⁸³ Per Article 4(b) of the Termination of Employment Convention, No. 158 of 1982. As well see Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment https://www.ilo.org/wcmsp5/groups/public/ed_norm/-normes/documents/meetingdocument/wcms_100768.pdf [accessed on the 12 Jan 2019].

²⁸⁴ See below para 2.2.2 dealing with traditional approach or progressive approach.

²⁸⁵ Per Article 4(b) of the Termination of Employment Convention, No. 158 of 1982. As well see Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment https://www.ilo.org/wcmsp5/groups/public/ed_norm/-normes/documents/meetingdocument/wcms_100768.pdf [accessed on the 12 Jan 2019].

²⁸⁶ Per Article 4(b) of the Termination of Employment Convention, No. 158 of 1982. As well see Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment https://www.ilo.org/wcmsp5/groups/public/ed_norm/-normes/documents/meetingdocument/wcms_100768.pdf [accessed on the 12 Jan 2019].

²⁸⁷ Per Article 4(b) of the Termination of Employment Convention, No. 158 of 1982. As well see Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment https://www.ilo.org/wcmsp5/groups/public/ed_norm/-normes/documents/meetingdocument/wcms_100768.pdf [accessed on the 12 Jan 2019].

the employee ought to show that the employee was warned on progressive basis without the employee positive response. It is however possible with certain types of misconducts that the employer would still be regarded to be fair to dismiss an employee without a single warning.²⁸⁸ Such instances include where an employee has committed some dishonesty misconducts which I submit, include some criminal misconducts.²⁸⁹

Article 4 of Convention No. 158 reemphasises the principle of justification in dismissal of employees including employees suspected of criminal misconducts. Article 4 of the Convention articulates this requirement as follows:

...termination of employment at the initiative of the employer within the definition under the Convention does not require countries to alter the terminology they use, so long as the substantive provisions in national law are applied to the persons covered by the Convention.²⁹⁰The Committee of Experts has, however, stressed that the manner in which termination of employment is defined is of particular importance, as it should not enable the employer to circumvent the obligations with regard to the protection prescribed in [the national law] in the event of dismissal.²⁹¹

It is submitted that Article 4 serves as a bulwark against unlawful processes of dismissals. It therefore encourages discipline and dismissal processes

²⁸⁸ Per Article 4(b) of the Termination of Employment Convention, No. 158 of 1982. As well see Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment
https://www.ilo.org/wcmsp5/groups/public/ed_norm/-normes/documents/meetingdocument/wcms_100768.pdf [accessed on the 12 Jan 2019].

²⁸⁹ Per Article 4(b) of the Termination of Employment Convention, No. 158 of 1982. As well see Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment
https://www.ilo.org/wcmsp5/groups/public/ed_norm/-normes/documents/meetingdocument/wcms_100768.pdf [accessed on the 12 Jan 2019].

²⁹⁰ Committee of Experts on the Application of Conventions and Recommendations, *General Survey – Protection against unjustified dismissal (1995)*, hereinafter “GS 1995”, at para. 21.

²⁹¹ Committee of Experts on the Application of Conventions and Recommendations, *General Survey – Protection against unjustified dismissal (1995)*, hereinafter “GS 1995” at para. 22.

that observe employee human rights. Such an understanding is triggered by the fact that the report of the ILC at its 67th Session is read to be making Article 4's principle of justification a central reference for termination of employment when it refers to it as "...centrepiece of the law governing termination of employment by the employer...."²⁹² The UN Committee on Economic, Social and Cultural Rights also paid regard to the importance of Article 4's principle of justification. It noted, in its General Comment No. 18 on the Right to Work, that,

...the violations of the right to work can occur through acts of omission, for example when State parties do not regulate the activities of individuals or groups to prevent them from impeding the right of others to work. Thus, the Committee on Economic, Social and Cultural Rights considered that "violations of the obligations to protect follow from the failure of State parties to take all necessary measures to safeguard persons within their jurisdictions from infringements of the right to work by third parties. They include omissions such as ... the failure to protect workers against unlawful dismissal."²⁹³

In the context where the condition for dismissal is of a criminal law nature, unlawful dismissal indicates, as emphasized in this theses, that the dearth of the observance of constitutional prescripts like section 35 of the right to self-incrimination in employer investigations and disciplinary hearings, is a failure of the legislature to take necessary measures in the protection against infringements to the right to work by third parties. That the contingent labelling to result from the investigation, which prohibits the employee to get further employment, is also exemplary of the failure of legislature to take necessary measures in the protection against infringements to the right to work by third parties.

²⁹² ILC, 67th Session, 1981, Report VIII (1), p. 7.

²⁹³ General Comment No. 18 on the Right to Work, UN Committee on Economic, Social and Cultural Rights (E/C.12/GC/18), adopted on 24 November 2005, at paragraph 35. See also paragraph 11 of the general comment in which reference is made to Article 4 of Convention No. 158.

It is the argument of this thesis that unlawful dismissal includes offending procedures that are well established in “national laws”²⁹⁴ for suspects of criminal offences within which employees suspected of criminal misconducts fall. Such ignorance of procedures creates an approach not justified in terms of South African constitutional demands in the Preamble read with sections 1,8,9 23, 33, 35,39 and 195.

Article 4 entrenches the need that employees suspected of every kind of misconduct be allowed to defend themselves in a hearing.²⁹⁵ Thus, in the case of hearings of misconducts based on criminal acts the International Labour Organisation Administrative Tribunal uses procedure that respects employee rights tantamount to South African Constitution Bill of Rights, including the right against self-incrimination. If such is a concern the ensued procedure negates purely flexibility-based approach and adopts proportionality-based approach. In the case of *N v FAO*²⁹⁶ the court emphasised on the general requirement for respect in due process in relation to an investigation. It was reiterated, namely that,

*investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made.... Where.... there is a prescribed procedure, that procedure must be observed.*²⁹⁷

The court emphasised on fair investigation, namely that,

....it is necessary that there be a fair investigation.... that there be an opportunity for the [accused] to answer the evidence and the

²⁹⁴ Section 35 of the Constitution read with the CPA entrench the law applicable to criminal suspects.

²⁹⁵ In terms of the Termination of Employment Convention, No. 158 of 1982.

²⁹⁶International Labour Organisation Administrative Tribunal 126TH Session Judgment No 4011 9.

²⁹⁷International Labour Organisation Administrative Tribunal 126TH Session Judgment No 4011 9.

*charges.... However, due process must also be observed at all other stages of disciplinary proceedings.*²⁹⁸

The court explained what due process entails, namely that,

*.... Due process requires that a staff member accused of misconduct be given an opportunity to test the evidence relied upon and, if he or she so wishes, to produce evidence to the contrary. The right to make a defence is necessarily a right to defend oneself before an adverse decision is made, whether by a disciplinary body or the deciding authority....*²⁹⁹

It is argued in this thesis that failure to follow established section 35 of the Constitution read with CPA procedures results in tainting the employee criminal suspect's good name.³⁰⁰ It is unfair and jeopardises employee criminal suspect's established rights. Such a process is anti ILO processes as well. In the case *O. v. WHO*³⁰¹ it was held that to decide a case of corruption against an employee

*A staff member who is accused of such dealings is certainly entitled to due process offering him every opportunity to defend his interests, and the burden of proof always falls upon the Administration All that is needed is a set of precise and concurring presumptions removing any reasonable doubt that the acts in question actually took place....*³⁰²

It is argued in this thesis that decision of cases of criminal misconducts on a balance of probabilities is antithesis *any reasonable* standard proposed by the ILO. Within the ILO prescripts even though there is no express disciplinary Convention, the ILO would not vouch for discipline that ignores

²⁹⁸International Labour Organisation Administrative Tribunal 126TH Session Judgment No 4011 9.

²⁹⁹International Labour Organisation Administrative Tribunal 126TH Session Judgment No 4011 9.

³⁰⁰ Chapters three, four and five expose the negative impacts of ignoring the rights of employees suspects of crime.

³⁰¹ International Labour Organisation Administrative Tribunal 123rd Session Judgment. No 3757.

³⁰²International Labour Organisation Administrative Tribunal 123rd Session Judgment. No 3757 para 6 .

the entrenched rights of either the employer or the employee, even if such employee committed a criminal misconduct.

The ILO in the treatment of its employees advocates for equal treatment of suspects within the prescripts of the law. It was observed earlier that for justification purposes, the ILO takes it seriously that where there is established procedure for investigation that ought to be followed. At the center of the ILO, consideration is justification for disciplinary procedure measures.³⁰³

2 2 The general meaning of discipline and the basis for employee discipline

There are hardly any scholarly definitions on the term discipline with regards to employment or labour law. In most cases this thesis will seek fundamental definitions from literal interpretations of discipline which are not from a legal perspective.

The thesis will later decipher the meaning of discipline from case law and statutes that deal with disciplinary processes. Traditionally, discipline is a concept founded on inequality where the superior or bigger commands the inferior. The foundational meaning of discipline is derived from the Latin word *discipulus*, which means *pupil*.³⁰⁴

Emanating from the word pupil is the word *disciple*, commonly used in the Bible to refer to the followers of Jesus Christ in his lifetime. In a nutshell, the historical connotations of discipline, “deal with study, governing one’s behavior, and instruction...”³⁰⁵ From this understanding comes the beginning of theories of education. Apart from these theories, there are

³⁰³ Per Article 4(b) of the Termination of Employment Convention, No. 158 of 1982. As well see Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment

https://www.ilo.org/wcmsp5/groups/public/ed_norm/-normes/documents/meetingdocument/wcms_100768.pdf [accessed on the 12 Jan 2019].

³⁰⁴ *The Oxford English Mini Dictionary*
<http://www.thefreedictionary.com/dishonesty> [accessed on the 15 April 2018].

³⁰⁵ *The Oxford English Mini Dictionary*
<http://www.thefreedictionary.com/dishonesty> [accessed on the 15 April 2018].

earliest known uses of discipline. These mainly related to punishment.³⁰⁶ Punishment-related discipline was first used in the 13th century to refer to chastisement of a religious nature.³⁰⁷ Amongst the punishment of this nature is *self-flagellation*.³⁰⁸

It is this category of discipline that is well emphasised. Accordingly, the literal meaning of the word discipline relates to words implying “punishment; instruction; training that corrects, molds, or perfects the mental faculties or moral character; control gained by enforcing obedience or order; orderly or prescribed conduct or pattern of behavior; self-control; a rule or system of rules governing conduct or activity.”³⁰⁹

Based on this literal meaning of discipline, the author understands that there is a plethora of classifications of *behavior* inclined to the meanings of discipline. For purposes of this thesis, only one classification is pursued. This is the classification regarding discipline in work environments.³¹⁰

In the context of this thesis, I look at discipline in respect of criminal misconducts. In accordance with the LRA,³¹¹ discipline entails more than just one stage of an investigation. Although disciplinary proceedings seem a step following employer investigations against the employee, they are by nature based on the first and fundamental procedural steps.

These steps are in effect the basis in the implementation of the principles of substantive and procedural fairness.³¹² These fundamental steps entail the requirement that the employer warns the employee on committed

³⁰⁶ The Oxford English Mini Dictionary
<http://www.thefreedictionary.com/dishonesty> [accessed on the 15 April 2018].

³⁰⁷ The Oxford English Mini Dictionary
<http://www.thefreedictionary.com/dishonesty> [accessed on the 15 April 2018].

³⁰⁸ The Oxford English Mini Dictionary
<http://www.thefreedictionary.com/dishonesty> [accessed on the 15 April 2018].

³⁰⁹ Merriam Webster Dictionary <https://www.merriam-webster.com/dictionary/punishment> [accessed 30 August 2018].

³¹⁰ Read Grogan J *Dismissal* (2018) 330-391. Consider the following literature Grogan J *Labour Litigation and Dispute Resolution*; Brand J et al *Labour Dispute Resolution*; Myburg A & Bosch C *Reviews in the Labour Courts South Africa*.

³¹¹ Schedule 8 of the Labour Relations Act, 66 of 1995.

³¹² Schedule 8 of the Labour Relations Act, 66 of 1995.

misconduct.³¹³ In accordance with the minimum LRA requirement, the employer must establish rules and has to avail them to the employee who ought to comply and upon failure to do so take disciplinary action.³¹⁴ The gravity of the action that the employer would take depends on whether the employee is a repetitive offender.³¹⁵ The type of misconduct also plays a role.³¹⁶ The forms of discipline vary in category from a verbal warning, to a written warning.³¹⁷ Thereafter follows a final written warning, leading to a suspension which is ultimately followed by dismissal after a disciplinary hearing. Thus, the Act promotes the system of progressive discipline.³¹⁸ Repeated misconduct calls for measures that are more stringent.³¹⁹ In such cases, the employer would call the employee to a disciplinary hearing and afterwards decide on whether to dismiss the employee.³²⁰ The rationale for employer's effort to observe several stages of discipline can be connected to the historical concept of *just cause*³²¹ emanating from the need for establishing fairness of disciplinary processes in the end. *Just cause* is a common law test used in labour matters to gauge whether employers acted fairly in enforcing employer and employee agreements.³²²

³¹³ Item 7 of Schedule 8 of the Labour Relations Act, 66 of 1995; *Sidumo* above note 180.

³¹⁴ Item 7 of Schedule 8 of the Labour Relations Act, 66 of 1995; *Sidumo* above note 180.

³¹⁵ Item 7 of Schedule 8 of the Labour Relations Act, 66 of 1995; *Sidumo* above note 180.

³¹⁶ Item 7 of Schedule 8 of the Labour Relations Act, 66 of 1995; *Sidumo* above note 180.

³¹⁷ Item 7 of Schedule 8 of the Labour Relations Act, 66 of 1995; *Sidumo* above note 180.

³¹⁸ Item 7 of Schedule 8 of the Labour Relations Act, 66 of 1995; *Sidumo* above note 180.

³¹⁹ Item 7 of Schedule 8 of the Labour Relations Act, 66 of 1995; *Sidumo* above note 180.

³²⁰ Item 7 of Schedule 8 of the Labour Relations Act, 66 of 1995; *Sidumo* above note 180.

³²¹ See *SA Maritime Safety Authority v McKenzie* 2010 3 SA 601(SCA);201031 ILJ 529(SCA) 550.

³²² See *SA Maritime Safety Authority v McKenzie* 2010 3 SA 601(SCA);201031 ILJ 529 (SCA) 550 at para 43.

It was a wide description of fairness and took into account the nature of the case at hand.³²³ Within its application from a common law perspective, the Industrial Courts observed and could test fairness regarding criminal misconduct within fairness measures observed when dealing with matters of a criminal law nature.³²⁴ Since the adoption of the Constitution, the underlying principle of *just cause* has been incorporated in the LRA provisions for fair dealing in labour matters.³²⁵ It is however argued that its application within LRA is constricted and not as wide as it used to be under common law.

As mentioned earlier, the purpose of the LRA was to give effect to the labour rights now guaranteed by section 23 of the Constitution³²⁶ and, the right to fair labour practice. In terms of South African jurisprudence on employee discipline within the scope of the LRA, the most important rights arising from that constitutional guarantee is the right not to be unfairly dismissed embodied in section 185 of the LRA.³²⁷ Thus, discipline wanting of fair substantive or procedural measures is dealt with within unfair labour practice provisions of the LRA.³²⁸

The employee is entitled to proceed to sue an employer within the LRA provisions that establish the mechanism for resolving disputes arising from unfair dismissal.³²⁹ Thus, such an aggrieved employee would also seek remedies specified in the LRA provisions.³³⁰ In the case where that remedy consists of compensation, the aggrieved will be compensated within the

³²³ Read *Jones Bonakele Gxolo v Harmony Gold Mine (PTY)Ltd and Others* case no J1124/2017 heard 24th October 2017 and Decided on 27th October 2017 Per Lagrange J. Refer to *Abrams RI & Nolan DR* 1985 DLR 594-623 at 595.

³²⁴ *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967(1) SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

³²⁵ Schedule 8 of the Labour Relations Act, 66 of 1995.

³²⁶ At the time of its enactment it was section 27 of the Interim Constitution.

³²⁷ *Fedlife Assurance Limited v Wolfaardt* 2002 1 SA 49 (SCA) para2.

³²⁸ Schedule 8 of the LRA.

³²⁹ Section 191 of the LRA.

³³⁰ Section 193 of the LRA.

LRA limitations.³³¹ As stipulated in the LRA, the statutory mechanism for resolving disputes where an aggrieved pleads just cause is by way of conciliation, and if that fails, arbitration before either the CCMA or the Labour Court.³³²

The ensued exposure guarantees the argument that as a basic principle, *just cause* underlies disciplinary processes. Even though falling within the limitations of the LRA, *just cause* as a standard behind employment contracts has a potential in the evaluation of employer's decision to discipline an employee. The extent of its application is also confined within the LRA and jurisdictional extent of the CCMA and the Labour Court. This has altered the pertinence of *just cause* in dealing with matters of criminal misconducts as a common law test. The consequence is that it could encourage the observance of fairness principles applicable to matters of criminal law nature, such principles now entrenched in section 35 of the Constitution.

Under common law, the *just cause* test served under seven subtests normally expressed directly in written contracts, or alternatively inferred in unwritten contracts of employment. These considerations include several reflections that were considered in evaluating whether employer's disciplinary action was both procedurally and substantively fair.³³³ It would be asked as to whether the employee was adequately warned in advance of the consequences of the offence.³³⁴ It would be observed whether there was an oral or written warning in encounters prior decision to discipline.³³⁵ An exception could be made for certain conduct, such as insubordination, coming to work intoxicated, drinking on the job, or stealing company

³³¹ Section 194(1) of the LRA.

³³² Schedule 8 of the LRA.

³³³ Referred to as the seven principles of just cause.

³³⁴ Abrams RI & Nolan DR 1985 *DLR* 594-623; Koven A M & Smith S L *Just Cause: The Seven Tests*; Stewart J S 1993 *Michigan Law Review* 8-62; Harcourt M; Hannay M & Lam H 2013 *J Bus Ethics* 115:311-325 at 311 and 313.

³³⁵ Abrams RI & Nolan DR 1985 *DLR* 594-623; Koven A M & Smith S L *Just Cause: The Seven Tests*; Stewart J S 1993 *Michigan Law Review* 8-62; Harcourt M; Hannay M & Lam H 2013 *J Bus Ethics* 115:311-325 at 311 and 313.

property, that are so serious that the employee is expected to know it will be punishable.³³⁶ *Just cause* would further demand that it be considered whether the company's rule or order reasonably related to efficient and safe operations.³³⁷ It would furthermore be considered as to whether management investigated the employee before administering the discipline.³³⁸ There was a precaution applicable, that where immediate action was required, the best course was to suspend the employee pending investigation with the understanding that the employee would be restored back to the job and be paid for time lost if found not guilty.³³⁹

The nitty- gritty of the process of investigation were also at stake, in that it would be considered as to whether the investigation was fair and objective.³⁴⁰ Fair and objective investigation was that which observed both of the basic principles of fairness, namely *audi alteram partem*³⁴¹ and *nemo iudex in propria sua causa*.³⁴² It would be checked if the investigation produced substantial evidence or proof of guilt. It was not, however a requirement that the evidence be preponderant, conclusive, or "beyond reasonable doubt," except where the alleged misconduct was of such a criminal or reprehensible nature as to stigmatize the employee and seriously impair employee chances for future employment.³⁴³

³³⁶Abrams RI & Nolan DR 1985 *DLR* 594-623; Koven A M & Smith S L *Just Cause: The Seven Tests*; Stewart J S 1993 *Michigan Law Review* 8-62; Harcourt M; Hannay M & Lam H 2013 *J Bus Ethics* 115:311-325 at 311 and 313.

³³⁷ Abrams RI & Nolan DR 1985 *DLR* 594-623; Koven A M & Smith S L *Just Cause: The Seven Tests*; Stewart J S 1993 *Michigan Law Review* 8-62; Harcourt M; Hannay M & Lam H 2013 *J Bus Ethics* 115:311-325 at 311 and 313.

³³⁸ Abrams RI & Nolan DR 1985 *DLR* 594-623; Koven A M & Smith S L *Just Cause: The Seven Tests*; Stewart J S 1993 *Michigan Law Review* 8-62; Harcourt M; Hannay M & Lam H 2013 *J Bus Ethics* 115:311-325 at 311 and 313.

³³⁹ Abrams RI & Nolan DR 1985 *DLR* 594-623; Koven A M & Smith S L *Just Cause: The Seven Tests*; Stewart J S 1993 *Michigan Law Review* 8-62; Harcourt M; Hannay M & Lam H 2013 *J Bus Ethics* 115:311-325 at 311 and 313.

³⁴⁰ Abrams RI & Nolan DR 1985 *DLR* 594-623; Koven A M & Smith S L *Just Cause: The Seven Tests*; Stewart J S 1993 *Michigan Law Review* 8-62; Harcourt M; Hannay M & Lam H 2013 *J Bus Ethics* 115:311-325 at 311 and 313.

³⁴¹Meaning hear the other side.

³⁴² No man shall be judged in his own cause also referred to as the rule against bias.

³⁴³ Abrams RI & Nolan DR 1985 *DLR* 594-623; Koven A M & Smith S L *Just Cause: The Seven Tests*; Stewart J S 1993 *Michigan Law Review* 8-62; Harcourt M; Hannay M & Lam H 2013 *J Bus Ethics* 115:311-325 at 311 and 313.

It would further be checked if the rules, orders, and penalties were applied even-handedly and without discrimination. If enforcement had been lax in the past, management could not suddenly reverse its course and begin to clamp down without first warning employees of its intent. Furthermore, it would be tested if the penalty reasonably related to the seriousness of the offense and the past record. If employee X's past record was significantly better than that of employee Y, the company properly would give X a lighter punishment than Y for the same offence. This requirement made flexibility the ultimatum of employer's disciplinary processes.

Consistent with these tests, in the current constitutional era and under the LRA, before the employer could take the employee to disciplinary hearing, the employer should have been satisfied that the employee had committed the gross misconduct by thoroughly investigating the employees' misconduct.³⁴⁴ As in criminal investigations, the employer is engaged in the investigation of the truth of the matter but due to extensive flexibility, the employer no longer makes similar observation of both principles of natural justice as it used to happen under common law.³⁴⁵ From this, the employer finds out if the employee intentionally or negligently performed a criminal act. Based on the gathered evidence, the employer uses discretion as to what form of discipline to apply on the employee.³⁴⁶

If the employer discovered that the employee was indeed guilty of the misconduct, the employer in turn presses criminal charges against such an employee.³⁴⁷ Even if the employer could decline pressing criminal charges, an investigated crime has a potential to invoke criminal justice processes. In that case, the employee would then be prosecuted under the criminal justice system based on the employer investigated criminal misconduct.³⁴⁸

³⁴⁴See Grogan J *Dismissal* (2018) at 321-322 as well, read *Hillside Aluminium (Pty)Ltd v Mathuse* (2016)37 ILJ 2082(LC).

³⁴⁵of *Avril* above note 6 at 1652. As well see *Sidumo* above note 180 para 59. Also read *Matsekoleng v Shoprite Checkers (Pty)Ltd* (2013) 2 BLLR 130 (LAC) paras 54-57. Myburg A & Bosch C *Reviews in the Labour Courts South Africa* 2016 271-282.

³⁴⁶ Grogan J *Dismissal* at 416-425; du Toit D etal *Labour Relations Law* at 461.

³⁴⁷ See Grogan J *Dismissal* at 416-425; du Toit D etal *Labour Relations Law* at 461.

³⁴⁸ See Grogan J *Dismissal* at 416-425; du Toit D etal *Labour Relations Law* at 461.

Thus employer discipline of employee criminal misconduct has now created a circumstance where there is a real or appreciable risk that an employee would face criminal prosecution.³⁴⁹ It exposes the employee criminal suspect to double jeopardy hence the argument that employee criminal misconducts could attract the wrath of both criminal and civil law systems discipline to run concurrently. The reason why it was possible that an offending employee be subjected to these severe repercussions is that the South African legal system is parallel by nature.³⁵⁰

The South African legal system creates a lacuna that makes it possible for aggrieved employers to exploit, often at the expense of the employee. The legal system allows employer opportunities to pursue remedies within both civil and criminal law systems as far as discipline of employees who committed criminal misconducts is concerned. Thus, there is likelihood for the entailed employer investigation to have a substantial influence on possible future criminal prosecution.³⁵¹ Even though there is a single objective in pursuing remedies against the employee alleged to have committed any misconduct, namely to condemn and discipline the criminal behaviour, the attendant civil and criminal processes follow disparate procedures.

The labour law disciplinary procedures for disciplining employees who committed criminal misconducts are founded from a diverse theoretical perspective compared to the underlying criminal law theories that found discipline of criminal perpetrators in proportionality. While criminal law punishment greatly relies on the principle of proportionality, labour law disciplinary perspectives greatly lean towards the principle of flexibility, enabling employer to act within informal processes.³⁵²

³⁴⁹ See Grogan J *Dismissal* at 416-425; du Toit D et al *Labour Relations Law* at 461.

³⁵⁰ Consider Gonzalez L G Connelly B G and Eliopoulos E 1993 *American Criminal Law Review* 1179-1220 at 1179; Eckers S R 1998 *Hofstra Law Review* 109; Bennet P J 2011 *American Criminal Law Review* 381; McCastlain C J and Schooner L S 1986 *Public Contract Law Journal* 418-445; Hassett M J 1979 *Washington and Lee Law Review* 1049; Marvil F H and James A W 1991 *Missouri Law Review* 869.

³⁵¹ See Grogan J *Dismissal* at 416-425; du Toit D et al *Labour Relations Law* at 461.

³⁵² Sidumo above note 180.

The ironical circumstance is that they both seek to pursue constitutional fairness against a perpetrator of a criminal act. In chapter one, it was exposed that constitutional fairness relating to matters of criminal law nature has its roots in the common law fairness principles entrenched section 35 of the Constitution. These fairness principles emphasise the recognition of both twin principles of natural justice—*audi alteram partem*³⁵³ and *nemo judex in propria sua causa*.³⁵⁴ The core of these principles is fairness justice based on proportionality.

As seen earlier, employer criminal investigations are currently done within the prescripts of LRA and are confined to fairness limitations within LRA prescripts.³⁵⁵ In chapter one, it was explained that employer disciplinary processes in accordance with the LRA observe one principle of natural justice—*audi alteram partem*³⁵⁶ and disregards *nemo judex in propria sua causa*.³⁵⁷ *Nemo judex in propria sua causa* demands cannot accommodate extensive flexibility allowed in the current era employer disciplinary processes on employees suspected of criminal misconduct within LRA prescripts. This principle sheds procedural bias obviously negated when dealing with employees suspected of criminal behaviour, especially where limited proportionality measures³⁵⁸ are used as opposed to those used when dealing with other criminal suspects.

It is argued that employer flexibility-based processes in investigating and disciplining the employee suspected of criminal misconducts is contrary to the need for justification proposed in Article 4 of Convention No. 158. The LRA disciplinary processes are also against the South African constitutional principles of justification entailed in the Preamble read with sections 1,8,9 23, 33, 35,39 and 195.

³⁵³ Meaning hear the other side.

³⁵⁴ No man shall be judged in his own cause also referred to as the rule against bias.

³⁵⁵ *Sidumo* above note 180.

³⁵⁶ Meaning hear the other side.

³⁵⁷ No man shall be judged in his own cause, also referred to as the rule against bias.

³⁵⁸ For example, precautionary measures used in the gathering of evidence, observance of the principle against self-incrimination and many others, discussed below. See Grogan J *Dismissal* at 416-425; du Toit D *et al Labour Relations Law* at 461.

Within the South African perspective, the principle of justification entails the observance of the South African Constitution as legitimately a paramount law, based on the *Grundnorm*.³⁵⁹ The Constitution as the source of justification of every law applicable in South Africa, is a testament of the existence of social contract in South Africa and it affords equal protection to all, be it individuals, private companies and public institutions.³⁶⁰ The Constitution controls massive powers of the private and public bodies alike while addressing the needs of the public and protecting the natural rights of individuals.³⁶¹ Chapter 2 of the Constitution entrenches the Bill of Rights;

³⁵⁹ Monyakane above note 9 at 21 footnote 89, extensively describes what *Grundnorm* means from a South African Constitutional perspective, she relates,

As Dietl et al Dictionary of Legal, Commercial and Political Terms (1979) 344, explains, Grundnorm refers to the basic standard of behaviour in democracy. Fuller The Morality of Law (1964) 69 referring to Grundnorm maintains that "Parliament legislation should reflect 'the basic rule' or 'Grundnorm' which relates to the rationale of state existence and to a greatest extent is reflected in the relevant state's constitution." Also see Bennet Administrative Law (2001) 6. Based on these explanations, in the South African constitutional context, Grundnorm comprises the basis for a basic standard of behaviour in the South African democracy based on human rights. The Preamble of the Constitution directly entrenches the rationale for the adoption of the South African Constitution, namely that South Africans having learned from the past experiences of injustices and being aware that there are special contributions to the existence of South Africa such as sufferings in pursuit of justice and freedom, economic and social developments, believed that South Africa belongs to all South Africans. Consequently, South Africans adopted a Constitution as the supreme law of the Republic in pursuit of healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights. The Constitution therefore laid the foundation for a democratic and open society in which government is based on the will of the people and where every citizen is equally protected by law. It further urges governance that improves the quality of life of all citizens and frees the potential of each person. It intends constitutional governance that builds a united and democratic South Africa, which will be able to take its rightful place as a sovereign state in the family of nations.

³⁶⁰ Section 1 explains the foundation of the document to be human dignity, the achievement of equality and the advancement of human rights and freedoms. It further explains that the Constitution negates racialism and sexism and that it sets up universal adult suffrage, a national common voters' roll, regular elections and multi-party system of democratic government, to ensure accountability, responsiveness and openness."

³⁶¹ Chapter 2 on the Bill of Rights, constitutional transformative objectives in the Preamble read with sections 1, 8,9,23,33,35,39 and 195 of the Constitution. Justification

central to the Bill of Rights is the right to administrative justice³⁶² and the right to fair dismissal,³⁶³ within which the LRA legislation provisions fall. The labour law jurisprudential interpretation of the LRA supports the view that section 145 of the LRA categorises legislation in consonance with the PAJA review standards umbrella.³⁶⁴

It is within these constitutional entrenchments that the justification and legitimacy of the LRA provisions must be sought. The South African Constitution justifies the inclusion of natural justice principles in the expression of the new human rights-based culture of justification.³⁶⁵ Under this system of justification, it is argued that it is impossible that the legislature in enacting LRA could have aimed at negating just cause-a principle that founds section 23 and embraced both principles of natural justice. Section 23 of the Constitution also existed to follow the ILO perspective of justification. It is therefore argued that any attempt to exclude *judex in propria sua causa* which is also the principle of natural underlying the Bill of Rights just like the *audi alterum partem* rule in interpreting the LRA perpetrates the *apartheid* era situation of South African parliamentary supremacy which legislated against the Industrial Court effort to enforce *just cause*³⁶⁶ in criminal misconducts cases.

Just cause in criminal misconducts coincides with the rationale for the criminalisation of acts in Schedules I to III of the CPA which are classified as dishonesty in LRA.

perspective of Section 23 entails that it cannot be read in isolation but as part of the Bill of Rights.

³⁶² As *Fedsure Life Ass Ltd v Greater Johannesburg TMC* 1998 12 BCLR 1458 (CC) 32 underscores, the right to administrative justice, is now rooted in the Constitution itself. This right builds in this regard on the Constitution, which “has radically changed the setting within which administrative law operates in South Africa.”

³⁶³ Cameron E, Cheadle H and Thompson C *The New Labour Relations Act*: 144-145 explained that section 23 entrenches the right to fair labour practice.

³⁶⁴ *Sidumo* above note 180.

³⁶⁵ See Klare K 1998 14 *SAJHR* 146, 158 and Mureinik E 1994 *SAJHR* 31, 32.

³⁶⁶ Is the embodiment of both principle of natural justice.

2 2 1 The rationale for the criminalisation of acts in Schedules I to III of the CPA

Through voluntary interaction and conduct, from time immemorial, humanity existed in groups which later became societies. The need to form a society came with the need to conform to certain norms. They entered the social contract.³⁶⁷ The pedestal of social theory or political theory is this agreement that humans made between each other, even though unwritten. The public could frown upon those who did not comply with societal norms. Defaulters were excluded from societal benefits as a form of condemnation. For example, some offenders were banished while some were killed as a form of revenge. An eye for an eye principle underpinned the justice system of that era.

From this perspective, criminalisation of certain acts can be defined as a system for public communication of acceptable values.³⁶⁸ It is these values which defined the destiny to acceptable norms. Due to the need for consistency and rationality in societal undertakings there emerged a need for rules governing societal decisions. This led to the adoption of natural justice principles.

At the center was the need for proportional criminal justice for offences of criminal nature. In criminal law, the principle of proportionality conceptualises the nature of punishment for criminal acts and inactions. It demands that punishment be in proportion to the gravity of the deed pertaining to crime. Proportionality apprehends indiscriminate and impartial justice and stimulates the attainment of individual self-determination through fair means as opposed to survival of the fittest measures. Survival of the fittest measures normally bred unreasonable condemnation.

In this thesis, it is argued that against the essentials of social contract, the employer investigative procedures and hearings for dismissal of employees

³⁶⁷ Read Locke's theory of "social contract," where he explained the human's state of nature, in Locke J *Two Treatises on Civil Government* 2.

³⁶⁸ Read Locke's theory of "social contract," where he explained the human's state of nature, in Locke J *Two Treatises on Civil Government* 2.

suspected of criminal misconducts do not abide with the nitty- gritty of justice embodied in the social contract. The employer has flexibility to go in between civil and criminal procedure to the extent that neither civil nor criminal procedure is strictly followed. Flexibility allows employer to ignore social contract protective measures; it creates unreasonable condemnations and therefore imbalances in justice. Social contract protective measures enliven the political theory underlying criminalisation of human acts.

2 2 1 1 The political theory underlying criminalisation of human acts in South Africa today

With the objective of protecting its society, South Africa classifies particular acts as crimes.³⁶⁹ The rationale behind the protection of individual members of society is to practicalise the essence of “social contract” founding the *principle of legality* in South Africa. Through the social contract, South African society has entrusted the state with its protection against persons that the society views as criminals. As well, persons being condemned, or labelled criminals, look upon the state for the protection of their dignity. They expect the law and its application to be consistent and clear. This marks the interrelationship between the legislation, enacted with the view to express societal objectives and the punishment meted out to persons labelled criminals by members of society.

The genesis of the principle of “social contract” is found in the interpretations by renowned philosophers³⁷⁰ who are now acclaimed in the South African interpretation of the *principle of legality*. Locke’s theory, for example, centres on the need for balance of power within the society. He reckoned that such balance can be maintained through law. The law ought to

³⁶⁹ There are both common law crimes and statutory crimes.

³⁷⁰ Locke; Montesquieu and Dicey.

suppress bad behaviour and protect the vulnerable from the powerful.³⁷¹ Within this understanding, Locke³⁷² explains the evolution of society. He mentioned that it depended on the human decision to transform from the state of nature to that of humanity. The state of nature from his observation was a state of lawlessness where the fittest exercised power against the weaker.³⁷³ They made powerless their subordinates.³⁷⁴ Humanity therefore meant surrendering human hope for justice to a chosen ruler. Humans decided to empower their ruler to govern them.³⁷⁵ The ruler was set to allay the fears of humans by assuring them protection against the dangers associated with their state of nature.³⁷⁶ The rule was to execute humans “common agreement on the nature of natural rights.”³⁷⁷ The ruler is supposed to proportionately protect the interests of the aggrieved and the perpetrators alike.³⁷⁸ As the principles of natural justice, extrapolated from Locke’s theory, demanded that at the instance of an allegation that an individual committed prohibited acts, the ruler ought to hear both sides and ought to not punish the aggrieved at their own cause.³⁷⁹ According to Monyakane³⁸⁰ Locke’s interpretation of social contract, makes natural law the starting point of his theory of the rule of law. She observed that Locke insists that the main purpose of natural law is to explain the foundation and maintenance of legal order.³⁸¹ She further referred to Locke’s argument on natural justice as providing the establishment of the

³⁷¹ Locke J *Two Treatises on Civil Government* 2, where he writes: “since no man or society of men having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another, whenever anyone shall go about to bring them into such a slavish condition they will always have a right to preserve what they have not a power to part with and rid themselves of those who invade this fundamental, sacred and unalterable law of self- preservation for which they entered into society. And thus, the community may be said in this respect to be always the supreme power.”

³⁷² Locke J *Two Treatises on Civil Government* 2.

³⁷³ Locke J *Two Treatises on Civil Government* 2.

³⁷⁴ Locke J *Two Treatises on Civil Government* 2.

³⁷⁵ Locke J *Two Treatises on Civil Government* 2.

³⁷⁶ Locke J *Two Treatises on Civil Government* 2.

³⁷⁷ Locke J *Two Treatises on Civil Government* 2.

³⁷⁸ Locke J *Two Treatises on Civil Government* 2.

³⁷⁹ Locke J *Two Treatises on Civil Government* 2.

³⁸⁰ Monyakane above note 9 at 10.

³⁸¹ Monyakane above note 9 at 10.

legal order which forms the primary right that protects individual rights. She maintains that this primary right is original and inalienable.

It is submitted that her interpretation of Locke's theory is close to the expression of criminal justice in South Africa and not labour law employer criminal persecutions.³⁸²

As mentioned earlier,³⁸³ the South African criminal justice observes both principles of natural justice, not only one leg as sought in labour law. Through this observation, the criminal justice system centres on the principle of proportionality and not flexibility experienced in labour law. It is through maintaining proportionality that individual rights are protected from the harsh nature of punishment in matters of a criminal law nature. Adherence to proportionality mitigates the inequalities inherent in criminal persecution where the persecuted rely on the mercy of the authorities.

This is the same situation in employer criminal investigations of employees suspected of criminal misconduct. The employer has power over the employee who stands at its mercy.³⁸⁴ However, labour law does not bind the employer to observe proportionality.³⁸⁵ Employers are flexible enough to can disregard the observance of fairness principles entrenched in section 35 to protect suspects of crime. Inherent in these principles is the twin principles of natural justice. The *nemo iudex in propria sua causa*³⁸⁶ principle is ignored in this attempt. This approach ends up in unjustifiable condemnations to employee suspects of criminal misconducts.

³⁸² Monyakane above note 9 at 10.

³⁸³ Chapters one and two.

³⁸⁴ By nature, the employer and employee relationship is unequal.

³⁸⁵ See chapter two part 2 2 4 1 dealing the theory of proportionality and its extent of application in criminal misconduct discipline.

³⁸⁶ Meaning no man shall be judged at his own cause.

2 2 1 2 The rationale for eradicating unjustifiable condemnation for Schedules I to III of the CPA transgressors

In most cases in the absence of governing rules, the society made irrational decisions which sometimes were irreversible.³⁸⁷ Some members of society wielded massive powers and turned into the law themselves.³⁸⁸ As referred to above, an eye for an eye was the rule of the day. Predominantly bullying manifested the uncontrolled societal justice perceptions.³⁸⁹ Members of society who were weaker required the law urgently so that they do not suffer effects of unreasonable condemnations.³⁹⁰ There was a need for a stabilised justice system. There was also a need to prevent the powerful from taking the law unto themselves. This philosophical milestone marks the formation of consistent systems for public communication of values.³⁹¹ It is through the set values that the criminalisation of certain acts and omissions was regulated and accepted.

It is argued that flexibility of employer who makes decisions to investigate the suspected employee criminal suspect for purposes of dismissal and yet does so without justified criminal procedure, creates inconsistencies and inequalities of justice for suspects of crime. While other criminals are investigated within the CPA and section 35 of the South African Constitution the employee criminal suspect is investigated within the employer discretion. Employer discretionary means of investigation offends the philosophical foundations of Schedule i and ii transgressions encompassing employee criminal misconducts.

³⁸⁷ Locke J *Two Treatises on Civil Government* 2.

³⁸⁸ Locke J *Two Treatises on Civil Government* 2.

³⁸⁹ Locke J *Two Treatises on Civil Government* 2.

³⁹⁰ Locke J *Two Treatises on Civil Government* 2.

³⁹¹ See Coffee J C 1991 *Boston University Law Review* 193 at 194 where he acknowledges the nature of criminal law. Also see Locke J *Two Treatises on Civil Government* 2.

2 2 2 The philosophical foundations of Schedules I to III of the CPA transgressions

Borne from the political theory, criminalisation of acts emanates from public concern. The concerns of South African public regarding the criminalisation of human behaviour are marked by diverse conceptions to the evolution of crime within the South African society. There were various apprehensions during the common law era compared to concerns in the current constitutional era. Public reaction to individual deeds is therefore moulded by culture within the societies. This understanding is acclaimed by White and Haines.³⁹² They reckoned that there is no straightforward answer to the question whether an act is a crime or not? This question is surrounded by changing ideas, perceptions, and conceptions. The fact that definitions are compliant to societal declarations and interests or that, the world has dispositions towards certain acts or omissions lead to these changes. These changes in turn lead to uncertainties.

Within the South African societies, for instance, there have been contours of acculturation. The most recent and predominant ones are the apartheid era culture and the democratic era culture of human rights. Both eras dealt differently with the definition of acts as crimes. For example, criminal labelling was inferred on employees who participated in picketing³⁹³ against their employers. Before the right to picket came into effect, there was a borderline between picketing and conspiracy.³⁹⁴ Commenting on the South African law before and after the Constitution, Leysath,³⁹⁵ reckoned the controversy that ensued on the issues of picketing. He explained that there has always been a clash of interests between employers and employees in South Africa whereby employers were concerned with profit gain while employees sought decent wages that enable them to survive. Due to this clash, persons partaking in pickets could inevitably breach either common

³⁹² White R and Haines F *Crime and Criminology an Introduction* 5 and 96.

³⁹³ Some involvements in picketing could be considered conspiracy.

³⁹⁴ *S v Smith* 1984 1 SA 583 (A).

³⁹⁵ Leysath C L *Picketing* 1.

law or statutory criminal law.³⁹⁶ Contrary to the common law era the constitutional era protects picketing. Section 17 of the Constitution entrenches the right to picket. Section 69 of the LRA provides protection for picketing and immunises participating employees from employers' possible inferences for criminal allegations.³⁹⁷

The South African legal experience therefore defies some of the sociological definitions of crime while it agrees with some of these definitions. As shown above, South African legal experience does not comply with a cross-cultural norm argument regarding crime. According to this norm, the conception of crime in essence does not vary against different cultures.³⁹⁸ It is however true as far as South Africa is concerned, that South African legal experience conforms to labelling approach which marks the existence of crime in relevant circumstances.³⁹⁹ Further than that, the South African law that criminalises condemned acts is embedded in formal legal instrument by the legislature or common law precedent.⁴⁰⁰ The defined crimes are sanctioned in the form of specific penalties.⁴⁰¹ It is also true that South African criminal law observes human rights approach⁴⁰² which defines crimes where certain violations of human rights are considered criminal.⁴⁰³ Due to the irreversible impacts of criminal labelling, the law protects individuals from being dispossessed of individual rights including dignity, unless proper procedure designed for matters of criminal law nature

³⁹⁶ Leysath C L *Picketing* 1.

³⁹⁷ Section 69 of the LRA.

³⁹⁸ White R and Haines F *Crime and Criminology an Introduction* 5 and 96.

³⁹⁹ The South African Criminal Law is found in statutory laws apart from the common law. On the interpretation of this approach, read White R and Haines F *Crime and Criminology an Introduction* 5 and 96. The main statute containing this law is the Criminal and Procedural Act 51 of 1977. As shown in chapter one, criminalised acts and omissions are defined in relevant schedules in the Criminal and CPA, in Schedules I to III.

⁴⁰⁰ See the provisions of the CPA and read White R and Haines F *Crime and Criminology an Introduction* 5 and 96.

⁴⁰¹ White R and Haines F *Crime and Criminology an Introduction* 5 and 96.

⁴⁰² See Klare K 1998 SAJHR 146, 158. and Mureinik E 1994 SAJHR 31, 32.

White R and Haines F *Crime and Criminology an Introduction* 5 and 96.

⁴⁰³ See section 35 of the Constitution. Read with White R and Haines F *Crime and Criminology an Introduction* 5 and 96.

is followed.⁴⁰⁴ Flexibility of employer criminal condemnations exposes employee criminal suspects to irreversible impacts. Employees are condemned as criminals without following procedure intended for criminal suspects labelling.

2 2 3 The impact of criminal labelling

Criminalisation and labelling have a damaging impact on an individual. Criminal labelling has a damaging civil impact on an individual; it interferes and compromises individual dignity and integrity,⁴⁰⁵ causing the labelled to endure unnecessary criminal liability. According to Ashworth,⁴⁰⁶ criminal liability is the strongest formal condemnation that society can inflict on an individual as it results in a sentence, which amounts to severe deprivation of ordinary liberties of the offender. The liability, resulting from labelling is therefore unnecessary for persons who have completed their sentence and remains inappropriate for individuals not yet convicted. However criminal liability resulting from labelling persists in our civil systems.

Under labour law, a mere allegation that an employee is a criminal, amounts to a gross misconduct and allows the employer to automatically dismiss the employee.⁴⁰⁷

The standard of proof that founds guilt for labour matters is on a balance of probabilities as opposed to beyond a reasonable doubt required in proving guilt under the criminal justice system.⁴⁰⁸ This means that a remedy for a criminal misconduct of theft is attained in a lesser standard under labour law measures than in case where theft is prosecuted in terms of the criminal procedure. Even if the employee later wins a criminal case, that decision

⁴⁰⁴ These are found in the CPA. See Cheh M M 1991 *The Hastings Law Journal* 1325 where she suggests ways of finding possible solutions.

⁴⁰⁵ See Ashworth A *Principles of Criminal Law* Page 1.

⁴⁰⁶ Ashworth A *Principles of Criminal Law* Page 1.

⁴⁰⁷ Ashworth A *Principles of Criminal Law* Page 1.

⁴⁰⁸ See *Avril* above note 6 at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 (20) ILJ 2679 (LC); *Markhams (a Division of Foschini Retail Group (Pty)Ltd v Matji No & others* (2003) 11 BLLR 1145 (LC).

does not affect the employer's prior decision to dismiss the employee nor does it restore the employee's dignity.⁴⁰⁹

According to Grogan,⁴¹⁰ South African labour law adopts the understanding that the employer's disciplinary powers be extended only to acts which constitute breaches of contract by employees.⁴¹¹ This apprehension excludes a possible analysis, that as employers exercise their discretion to dismiss employees suspected of criminal misconducts, they in fact inherit criminal jurisdiction over their employees. As Grogan acknowledges, "employee misconduct may amount to both a breach of the employment contract and a criminal offence. In such cases, the employee may face the wrath of both the employer and the State"⁴¹². An employee cannot plead either in disciplinary proceedings or in a criminal trial that prosecution breaches the double jeopardy principle because action has already been instituted in another tribunal. Disciplinary proceedings against employees in their capacity as subjects of the State are different and separate proceedings.⁴¹³ An employee can therefore be punished separately by both criminal court and disciplinary hearings arising from the same facts."⁴¹⁴ It is submitted that this scenario breeds injustices.

Wainwright⁴¹⁵ equates these injustices to the underlying rationale to the principles that guide the employer, she writes that,

If an employee has been dismissed and is subsequently found not guilty in a criminal court of the alleged misconduct, this will not as matter of courses render the initial dismissal unfair. The essential question remains whether the evidence and information known to the

⁴⁰⁹ See Wainwright A FASSET Labour Relations Guideline www.fasset.org.za/downloads/Labour_Legislation_Guideline.doc [accessed 12 07 2016] 11. (Hereinafter Wainwright).

⁴¹⁰ Grogan J *Dismissal* (2018) 213.

⁴¹¹ Grogan J *Dismissal* (2018) 213.

⁴¹² *Martins v Roopa NO & Others* (2011) 32 ILJ 353 (LC).

⁴¹³ *Zondi and SA Police Service* (2011) 32 ILJ 1796 (BCA).

⁴¹⁴ *Moshela v CCMA & others* (2011) 32 ILJ 2692 (LC).

⁴¹⁵ Wainwright above foot note 408 at 11.

*employer at the time of the dismissal was sufficient to justify it.*⁴¹⁶ *The reasoning for this is that different standards of proof are required by the employer in the disciplinary inquiry and by the criminal trial.*⁴¹⁷

The South African law of evidence can also be pin pointed for these skewed results because it maintains the well challenged common law principle in *Hollington v Hewthorn & CO Ltd.*⁴¹⁸ The rule in *Hollington* ⁴¹⁹ says that evidence of a criminal conviction is not admissible in subsequent civil proceedings to prove the facts on which the conviction is founded, where those facts are an issue in the civil proceedings. As early as the late sixties, there has been widespread criticism against this rule from the jurisdiction where it originates.⁴²⁰ The strongest argument in pursuit of change is that the trier of fact in the civil action may give more weight to the conviction than it deserves.⁴²¹

⁴¹⁶ Even if it was wrong, I suppose, in cases where subsequent criminal trials prove it wrong.

⁴¹⁷ Wainwright above foot note 408 at 11.

⁴¹⁸ *Hollington v Hewthorn & CO Ltd* [1943] 2 All ER 35.

⁴¹⁹ *Hollington v Hewthorn & CO Ltd* [1943] 2 All ER 35.

⁴²⁰ Refer to authorities mentioned in Footnote 3 in Dean M "Law Reform Committee: Fifteenth Report on the Rule in *Hollington v Hewthorn*" MLR Vol 31 No 1 1986 58-64 at page 58 Published by: Wiley on behalf of the Modern Law Review Stable URL: <http://www.jstor.org/stable/1092315> [Accessed: 27-05-2018 23:48 UTC.] For ease of reference some literature and cases are here mentioned as per footnote;

Goody v. Odhams Press Ltd. [1967] 1 Q.B. 833; *Barclays Bank v. Cole* [1967] 2 W.L.R. 166; these cases are discussed in [1967] *Crim.L.R.* 441; Cross, *Evidence*, 3rd ed. pp. 360 and 373 et seq.; Wigmore *Evidence*, 3rd ed., Vol. V, p. 687 et seq.; Cowen & Carter, *Essays on the Law of Evidence*, Chap. VI; Wright 21 *Can.B.R.* 653; Goodhart (1943) 69 *L.Q.R.* 299; Coutts (1955) 18 *M.L.R.* 231; the rule is defended by Hinton, 27 *Illinois L.R.* 195. There have always been a number of recognised exceptions: *Criminal Procedure Act* 1865, s. 6, allowing proof of convictions to discredit a witness; *Matrimonial Causes Act* 1965, s. 3 (1) (2); *Ingram v. Ingram* [1956] P. 390; *Petrie v. Nuttall* (1856) 11 *Exch.* 569. In certain cases the effect of the conviction and sentence may itself be relevant, as in the exercise of the court's discretion to pass over the defendant's personal representatives in granting probate: *Re S.* [1967] 3 W.L.R. 325; explaining *In the Estate of Crippen* [1911] P. 108. A plea of guilty would be admissible as an admission if made by a party to the action.

⁴²¹ Law Reform Committee: Fifteenth Report on the Rule in *Hollington v. Hewthorn* Author(s): Michael Dean Source: *The Modern Law Review*, Vol. 31, No. 1 (Jan., 1968), pp. 58-64 at pages 58-60, Published by: Wiley on behalf of the Modern Law Review Stable URL: <http://www.jstor.org/stable/1092315> [Accessed: 27-05-2018 23:48 UTC].

From the Canadian perspective,⁴²² the risk is particularly great in civil jury trials. On the other hand, bearing the fact that the convicted person had not only been present, but had all the safeguards that the criminal law provided, including the presumption of innocence, an advantage is noted.

Advocates of change argue that there ought to be statutory reforms.⁴²³ They recommended that evidence of the conviction of any person for an offence in a Canadian court, whether federal or provincial, be admissible to prove that the suspect committed that offence. That such evidence be admissible regardless of whether the suspect was convicted on a plea of guilty, was a party to the civil proceeding or all else.

The other recommendation is that the contents of the information, complaint, indictment or charge sheet be admissible as well. Further, that in suitable circumstances, proof of a subsisting conviction or acquittal be conclusive evidence that the convicted person committed the offence or did not commit the offence.⁴²⁴

If the above suggestions for change would be adopted in South African labour law, the opposite of what is currently taking place would be assured. Inadmissible evidence of a criminal conviction would be admissible in subsequent labour law proceedings to prove the facts on which the conviction was founded, where those facts are an issue in the dismissal proceedings. Consequently, inadmissible acquittals would be admissible and, as such, the labelling of employees as criminals within balance of probabilities standards would be mitigated.

⁴²² Law Reform Committee: Fifteenth Report on the Rule in *Hollington v. Hewthorn* Author(s): Michael Dean Source: *The Modern Law Review*, Vol. 31, No. 1 (Jan., 1968) pp. 58-64 at pages 58-60, Published by: Wiley on behalf of the Modern Law Review Stable URL: <http://www.jstor.org/stable/1092315> [Accessed: 27-05-2018 23:48 UTC].

⁴²³ Law Reform Committee: Fifteenth Report on the Rule in *Hollington v. Hewthorn* Author(s): Michael Dean Source: *The Modern Law Review*, Vol. 31, No. 1 (Jan., 1968), pp. 58-64 at pages 58-60, Published by: Wiley on behalf of the Modern Law Review Stable URL: <http://www.jstor.org/stable/1092315> [Accessed: 27-05-2018 23:48 UTC].

⁴²⁴ Law Reform Committee: Fifteenth Report on the Rule in *Hollington v. Hewthorn* Author(s): Michael Dean Source: *The Modern Law Review*, Vol. 31, No. 1 (Jan., 1968), pp. 58-64 at pages 58-60, Published by: Wiley on behalf of the Modern Law Review Stable URL: <http://www.jstor.org/stable/1092315> [Accessed: 27-05-2018 23:48 UTC].

The opposite is happening under the current application of the *Hollington v Hewthorn* rule.⁴²⁵ Once an employee has been labelled a criminal offender within the current unjustified employer criminal investigative processes and hearing processes, it is the end of the story. Even if the criminal court acquits the employee, such would not form evidence before the labour court, the labelled employee would not easily find employment.⁴²⁶ Certain laws in the form of statutes, principles and case law precedent, act as direct barriers.⁴²⁷ In other jurisdictions, these barriers are found in various statutes, for example, occupational code licensing requirements.⁴²⁸ These laws require employers to exclude applicants with criminal convictions and, in some cases, arrest records.⁴²⁹ In most cases, the discretion to exclude previously condemned employees is not controlled via legislation.⁴³⁰ This circumstance makes it difficult to monitor this system of exclusions.⁴³¹ In

⁴²⁵ *Hollington v Hewthorn & CO Ltd* [1943] 2 All ER 35.

⁴²⁶ *Du Plessis v Department of Correctional Services* PSGA 787-05/06 (2006) General Public Service Sectoral Bargaining Council, Edgemoed. It held for the principle that an employee ought to disclose previous convictions during interviews. In South African law there are set rationales in principles of evidence regarding disclosure of previous convictions. In this regard, the labour law does not subject itself to these principles. In *Bhembe / Independent Development Trust (IDT)* - 2015 24 CCMA 7.17.1 2015]11 BALR 1149 (CCMA) the court found that it was never a requirement set by the employer for employee to disclose that she was previously dismissed and that she was subject to pending criminal charges. Also read Keller S K and Harris M P *Journal of Contemporary Criminal Justice* 6-30.

⁴²⁷ See *Du Plessis v Department of Correctional Services* PSGA 787-05/06 (2006) and *Bhembe / Independent Development Trust (IDT)* - 2015 24 CCMA 7.17.1 2015 11 BALR 1149 (CCMA). Also read Keller S K and Harris M P 2005 *Journal of Contemporary Criminal Justice* 6-30.

⁴²⁸ See *Du Plessis v Department of Correctional Services* PSGA 787-05/06 (2006) and *Bhembe / Independent Development Trust (IDT)* - 2015 24 CCMA 7.17.1 2015 11 BALR 1149 (CCMA). Also read Keller S K and Harris M P 2005 *Journal of Contemporary Criminal Justice* 6-30.

⁴²⁹ See *Du Plessis v Department of Correctional Services* PSGA 787-05/06 (2006) and *Bhembe / Independent Development Trust (IDT)* - 2015 24 CCMA 7.17.1 2015 11 BALR 1149 (CCMA). Also read Keller S K and Harris M P 2005 *Journal of Contemporary Criminal Justice* 6-30.

⁴³⁰ See *Du Plessis v Department of Correctional Services* PSGA 787-05/06 (2006) and *Bhembe / Independent Development Trust (IDT)* - 2015 24 CCMA 7.17.1 2015 11 BALR 1149 (CCMA). Also read Keller S K and Harris M P 2005 *Journal of Contemporary Criminal Justice* 6-30.

⁴³¹ See *Du Plessis v Department of Correctional Services* PSGA 787-05/06 (2006) and *Bhembe / Independent Development Trust (IDT)* - 2015 24 CCMA 7.17.1 2015 11 BALR 1149 (CCMA). Also read Keller S K and Harris M P 2005 *Journal of Contemporary Criminal Justice* 6-30.

these circumstances the fairness of this discretion cannot be vouched for. From a constitutional perspective, the impact of matters of a criminal law nature on perpetrators amounts to harsh realities.

While it could be argued that a criminal would have brought the condemnation upon oneself, it is also important that right persons are condemned, and only correct ways are used to condemn an individual. In order to rescind exceptional cases where errors were performed, in an attempt to find justice for the aggrieved, only rational measures ought to apply before an individual can be condemned.

As seen above, detriments attracted by perpetrators of criminal acts bear similar gravities regardless of whether they are remedied under civil law or criminal law. It has been argued that civil remedies even attract harsher punishment than criminal remedies.⁴³² The civil remedy is guided by intuition of the presiding person as opposed to prospective, general, clear, consistent, verifiable, strictly construed, and defined law. In these circumstances, criminal persecution within the LRA terms bears consistent injustices.⁴³³ It is trite to view it as an antithesis to the rationale for punishment in matters of a criminal law nature.

In order to discipline the employee criminal suspects, they are labelled criminals. The ensued procedure is on the balance of probabilities as

⁴³² See Bagaric M 2004 *Journal of Criminal Law* 329-355 at page 332.

The disunity between criminal sanctions and employment deprivations is arguably objectionable for four reasons: (1) it leads to double punishment; (2) it reduces the rehabilitation prospects of offenders; (3) it violates the principle of proportionality; and (4) it violates the principle of equality of sanctions.

As well see Coffee J C 1991 *Boston University Law Review* 193 at 194 where he acknowledges the nature of criminal law. Regarding the possibility of prejudicial processes read Cheh M M 1991 *The Hastings Law Journal* 1325. Also read Basdeo V 2013 *African Journal of International and Comparative Law* 303-326; McCastlain C J and Schooner L S 1986 *Public Contract Law Journal* 418-445; Gonzalez L G Connolly B G and Eliopoulos E 1993 *American Criminal Law Review* 1179-1220 at 1179; Hasset M J 1979 *Washington and Lee Law Review* 1049; Eckers S R 1998 *Hofstra Law Review* 109.

⁴³³ See Bagaric M 2004 *Journal of Criminal Law* 329-355 at page 332. As well, read Grogan J *Dismissal* (2018) 17. Consider, *Martins v Roopa NO & Others* 2011 32 ILJ 353 (LC); *Zondi and SA Police Service* 2011 32 ILJ 1796 (BCA); *Moshela v CCMA & others* 2011 32 ILJ 2692 (LC).

opposed to a standard used for criminal suspects. Section 35 of the Constitution read with the CPA entrench the standard: beyond a reasonable doubt. This implies that an accuser must provide such evidence that does not pose a doubt that the suspected criminal has perpetrated the alleged criminal act.

2 2 4 Principles underlying discipline of employees suspected of criminal misconduct

Proportionality and flexibility are the two major principles behind the perspectives on the discipline of employees who are alleged to have committed criminal misconducts. As it will be realised below, their outlooks differ widely. Proportionality advocates for the consideration of the interests of the individual who is subject to discipline, while flexibility seeks to satisfy only the interests of the employer disciplinarian regardless of what is at stake for the employee criminal suspect.⁴³⁴

Employer investigations for disciplinary hearing of employees suspected of criminal misconducts is more inclined towards flexibility than proportionality, hence the understanding that it is civil procedure and not criminal procedure.

2 2 4 1 The theory of proportionality and its extent of application in criminal misconducts discipline

The literal interpretation of proportionality relates to the balancing of two interests to find a solution.⁴³⁵ Bearing the contours of the South African legal system, an argument that the proportionality principle in South Africa has evolved in two stages, cannot be without basis. Originally from Germany⁴³⁶ and then wider Europe,⁴³⁷ the principle of proportionality is understood to have embraced South African common law at the adoption of English

⁴³⁴ Barrie G N 2013 *SAPL*1.

⁴³⁵ Barrie G N 2013 *SAPL*1.

⁴³⁶ Barrie G N 2013 *SAPL*1.

⁴³⁷ Barrie G N 2013 *SAPL*1.

procedural law in 1917.⁴³⁸ The gist of its existence was ensconced in the principles of natural justice from the Roman-Dutch law perspective of the South African common law.⁴³⁹

Natural justice principles as explained in chapter one maintains a balance in the administration of justice,⁴⁴⁰ an aspect analogous to the objective of proportionality principles. As shown in chapter one, even though natural justice principles were of paramount importance in pursuit of proportionality, they were negated by default when civil law matters were an issue.⁴⁴¹ This ensued at the peril of the rule of law and the rise of South African parliamentary supremacy aimed at promoting the principle of separate development to subdue individual rights.⁴⁴²

Due to this pursuit, courts shied away from invoking the principles of natural justice and hence the minimised reference to the principle of proportionality especially in civil matters comprising employer and employee relationships. As chapter one exposed, it was through sheer pursuit of integrity that the Industrial Courts insisted on the application of natural justice principles at the peril of South African parliamentary scrutiny and their decisions being overruled through South African parliamentary legislations. The common law position has been transformed in the current constitutional perspective. The Constitution provides that the judiciary should be free and independent.⁴⁴³ It demands that the courts should “promote and fulfil”⁴⁴⁴ through their professional work the “democratic values of human dignity,

⁴³⁸Schreiner M C *The Contribution of English Law* 10.

⁴³⁹ Schreiner M C *The Contribution of English Law* 10.

⁴⁴⁰ Marshall *Natural Justice* 12.

⁴⁴¹This is marked by the different decisions, which lacked consistency regarding the extent of administrative discretion. See *Shidiak v Union Government* 1912 (AD) 651; *Union Government v Union Steel Corporation* 1928 (AD) 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A); *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

⁴⁴² Schreiner M C *The Contribution of English Law* 10. As well read Monyakane above note 9 at pages 5, 22, 38 and 61.

⁴⁴³ Section 165(2) of the Constitution.

⁴⁴⁴ Klare K 1998 *SAJHR* 146 158.

equality and freedom,”⁴⁴⁵ and they should work to “establish a society based on democratic values, social justice and fundamental human rights.”⁴⁴⁶ In particular, section 39(2) of the Constitution provides that, when interpreting legislation and developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.⁴⁴⁷ Justice Aurrer Chaskalson⁴⁴⁸ mentions specifically that “the need for... [controlling power]... through courts is vital for the welfare of individuals in that it preserves their constitutionally entrenched rights.”⁴⁴⁹

The Constitution also sets the extent of and limits to proportionality review, as it demands that the judiciary must “be conscious of the values underlying the Constitution and interpret the Constitution bearing in mind the involved technique of making constitutional choices by balancing competing fundamental rights and freedoms.”⁴⁵⁰ To effect this requirement, the judiciary must refer to a system of values extraneous to the constitutional text, but “embraced by, contemplated in or underlying the text, or immanent within the legal order, that is, they must be *legal*, not personal or political, values.”⁴⁵¹

In short, what this explanation entails, is the need for persons in authority to observe proportionality in order to balance the clashing interests within their control. This indicates that the principle of proportionality sustained in the constitutional era is considered a useful tool in the application of section 36 of the South African Constitution, particularly with regard to the

⁴⁴⁵ Klare K 1998 *SAJHR* 146 158.

⁴⁴⁶ Klare K 1998 *SAJHR* 146 158.

⁴⁴⁷ *Pharmaceutical Manufacture Association of South Africa In Re: The Exparte Application of the Republic of South Africa* 2000 (2) SA 674 (CC) 49.

⁴⁴⁸ President of the Constitutional Court of South Africa 1991-2004.

⁴⁴⁹ *Pharmaceutical Manufacture Association of South Africa In Re: The Exparte Application of the Republic of South Africa* 2000 (2) SA 674 (CC) 45; also see *Mahambehlela v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE).

⁴⁵⁰ *State v Zuma* 1995 (4) BCLR 401 (CC) 17.

⁴⁵¹ Per Mokgoro J, in *State v Makwanyane*, 1995 (6) BCLR 665 (CC) 302-304.

limitations clause on individual rights.⁴⁵² As Barrie⁴⁵³ extrapolates, "...this general limitation clause (which was also included in South Africa's Interim Constitution of 1993,⁴⁵⁴) for all practical purposes introduced the doctrine of proportionality to our constitutional⁴⁵⁵ jurisprudence."⁴⁵⁶ He acknowledges the observation that there is a close link between proportionality,⁴⁵⁷ justifiability, rationality and reasonableness.⁴⁵⁸ Thus he sees the principle of proportionality not as a limitation to the way decisions were reached, but as an elevated concept enabling consideration of both substance and merits of case matter.⁴⁵⁹ This is understood to mean that unlike under common law, where proportionality could be used to establish the resultant decision in accordance with the positivist approach adopted in the parliamentary supremacy approach, the constitutional era proportionality also tests the fibre of the law sanctioning the decision taken.

The essence of the limitation's clause is well captured by Woolman and Botha⁴⁶⁰ where they refer to it as possessing a proportionality assessment,

⁴⁵² Read the Canadian perspective in *R v Oakes* 1986 1 SCR and compare with Constitutional jurisprudence on proportionality. In particular read *S v Makwanyane* 1995 6 BCLR 665 (C); 1995 3 SA 391(CC).

⁴⁵³ Barrie G N 2013 SAPL 1.

⁴⁵⁴ Section 33. In *Roman v Williams No* 1997 9 BCLR 1267 (C) which dealt with s24(d) of the Interim Constitution the close link between proportionality, justifiability, rationality and reasonableness was demonstrated. Van Deventer J at 1275 held that s24(d) "imports the requirement of proportionality between means and end and the role of the courts in judicial reviews is no longer limited to the way in which an administrative decision was reached but now extends to its substance and merits."

⁴⁵⁵ The term "constitutional" must be interpreted broadly as it also encompasses our administrative law. An example is *Dotcom Trading 121 (Pty)Ltd t/a Live Africa Network News v The Honorable Mr Justice King No* 2000 4 All SA 128(C) at 128-132; 2000 4 SA 973 (C) para 61, where it was held that the decision of the chairperson of a commission of inquiry into match fixing in cricket to ban radio broadcasts of the proceedings could not be justified with reference to the limitations clause. This was because no consideration was given by chairperson to less restrictive means.

⁴⁵⁶ Barrie G N 2013 SAPL1.

⁴⁵⁷ In terms of section 35 of the Constitution.

⁴⁵⁸ Well espoused in section 33 of the Constitution.

⁴⁵⁹ The term "constitutional" must be interpreted broadly as it also encompasses our administrative law. An example is *Dotcom Trading 121 (Pty)Ltd t/a Live Africa Network News v The Honorable Mr Justice King No* 2000 4 All SA 128(C) at 128-132 ; 2000 4 SA 973 (C) para 61 where it was held that the decision of the chairperson of a commission of inquiry into match fixing in cricket to ban radio broadcasts of the proceedings could not be justified with reference to the limitations clause. This was because no consideration was given by chairperson to less restrictive means.

⁴⁶⁰ Woolman S and Botha H *Limitations* 13.

demanding at least that there ought to exist a *rational* connection between the means employed and the objective sought. Further, this clause entrenches assessment on the extent of impairment imposed by the adopted means on the constitutional right in issue. The demand is that the impairment must be minimal. Furthermore, that the “burdens that flow from the limitations and imposed on those whose rights are impaired [ought not] outweigh the benefits to society.”⁴⁶¹ The ensued constitutional impression regarding the reasonable and necessary limitation of individual right in a democratic society would concisely be considered as calling for “the weighing up of competing values and ultimately an assessment based on proportionality.”⁴⁶² As to how this attempt unfolds, section 36 ⁴⁶³prescribes the following steps:-

- that the rights in the Bill of Rights be limited only in terms of the law of general application;
- that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom,
- that all relevant factors must be considered including the nature of the right;
- the importance of the purpose of the limitation,
- the nature and extent of the limitation,
- the relation between the limitation and its purpose, and the availability of less restrictive means to achieve the purpose.

Regarding labour law, the adoption of this assessment was validated by courts but within a limited extent. According to *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (hereinafter Sidumo)*⁴⁶⁴ the assessment of proportionality entails the assessment of the employer’s decision to dismiss an employee who has committed a gross misconduct.

⁴⁶¹ Woolman S and Botha H *Limitations* 13.

⁴⁶² *S v Makwanyane* 1995 6 BCLR 665 (C); 1995 3 SA 391(CC) para 104.

⁴⁶³ Section 36 of the Constitution.

⁴⁶⁴ 2007 28 ILJ 2405 (CC); 2007 12 BLLR 1097 (CC) at para 75.

The Constitutional Court,⁴⁶⁵ unanimously set aside the decision of the *court a quo* and held that on a plain reading of all the relevant provisions of the LRA, it is clear that a commissioner or arbitrator must, as an impartial adjudicator, determine whether the dismissal was fair and that the *commissioner's sense of fairness* must prevail and not *the employer's view*.⁴⁶⁶ The Constitutional Court went on to indicate what ought to be the basis of *commissioner's sense of fairness*. It held that a determination of the fairness of a dismissal requires a consideration of the following:

- the totality of the circumstances of the matter;
- whether what the employer did was *fair* within *LRA prescripts*;
- the importance of the rule that the employee breached;
- the reason the employer imposed the sanction of dismissal;
- the basis of the employee's challenge to the dismissal;
- the harm caused by the employee's conduct;
- whether additional training and instruction may result in the employee not repeating the misconduct;
- the effect of dismissal on the employee; and
- the long service record of the employee.⁴⁶⁷

According to *Sidumo*⁴⁶⁸ read together with the Code,⁴⁶⁹ the list is not exhaustive and none of the above factors will be determinative; the factors must all be weighed in determining what is fair in the circumstances.

Practically, what transpires in disciplinary proceedings is that the employer establishes the factual basis or a fair reason for the dismissal the above-tabled considerations. However, the employer can exclude in its assessments, the effects of its actions on any other underlying rights. In employer criminal investigations and disciplinary hearings on employees

⁴⁶⁵ 2007 28 ILJ 2405 (CC); 2007 12 BLLR 1097 (CC) at para 75.

⁴⁶⁶ *Sidumo* above note 180 at para 75.

⁴⁶⁷ *Sidumo* above note 180 paras 78-79.

⁴⁶⁸ *Sidumo* above note 180 paras 78-79.

⁴⁶⁹ LRA Schedule 8: Code of Good Practice.

who have committed criminal misconduct, the employer is not tasked to consider employee rights as criminal suspects.

The employee in turn would not have access to the CCMA to review employer processes vis-a-vis these rights because they fall out of the circumstances outlined for application within the LRA prescripts as held in the *Sidumo*⁴⁷⁰ matter. Thus, within the LRA review, proportionality is viewed as a mere limitation to the way in which decisions are reached. There need not be consideration of both substance and merits of the matter as constitutionally envisaged.⁴⁷¹

The situation here is comparable to untransformed common law processes where proportionality could be used to test the resultant decision and not the fibre of the law sanctioning the decision taken. Seemingly, employers are allowed to overlook the ensued employee rights, but only centre their decisions on their interests, regardless of whether such employee rights are constitutionally entrenched. The common law breach of the trust principle supersedes the fair trial rights entrenched in section 35 of the Constitution. The employer must heed that objectively, the reason for the decision to dismiss the employee must have been based on an act of grave or serious misconduct warranting permanent termination of the employee relationship with the employer. The *nature* of the misconduct does not matter.⁴⁷² The employee's act of misconduct must render the continuation of the employment relationship intolerable to the employer. Mindful of the fact that what is intolerable to one employer may be tolerable to another, there are inevitable inconsistencies in disciplining perpetrators of the same criminal act.

⁴⁷⁰ *Sidumo* above note 180 paras 78-79.

⁴⁷¹ The term "constitutional" must be interpreted broadly as it also encompasses our administrative law. An example is *Dotcom Trading 121 (Pty)Ltd t/a Live Africa Network News v The Honorable Mr Justice King* No 2000 4 All SA 128 (C) at 128-132 ;2000 4 SA 973 (C) para 61, where it was held that the decision of the chairperson of a commission of inquiry into match fixing in cricket to ban radio broadcasts of the proceedings could not be justified with reference to the limitations clause. This was because no consideration was given by chairperson to less restrictive means.

⁴⁷² Ashworth A *Principles of Criminal Law* page 1.

It is here worth considering *Anglo American Farms t/a Boschendal Restaurant v Komwayo*,⁴⁷³ and *Donald Baphuthi v The CCMA and Others*,⁴⁷⁴ respectively, where in both cases the employees were accused of dishonesty. In one case the employee who had had a long period of service stole a can of Fanta while in another case two employees were found to be dishonest to their employer because of their involvement in the perpetration of a single act of dishonesty. In the former case, dismissal was guaranteed regardless of the gravity of mitigating factors. Among these factors was the fact that the employee had worked for the company for a long period of time while honest. In the latter case one employee was expelled while the other was given a written warning.

These cases symbolise a fluid approach towards the discretion to dismiss. The basis of these varying decisions was whether the employer felt that the action of an individual had negatively affected the relationship between the employer and the employee. In a way, the employer's discretion is based on *simulated* procedural guidelines.⁴⁷⁵ Due to lack of defined rules pertaining to the exercise of discretion to dismiss where an alleged criminal conduct breach is at issue, the employer's decision settles on the nebulous employer allegation that the employee has breached the *implied mutual trust and confidence*.

Consequently, if the matter is taken before the CCMA for review, where the conduct of the employee is found to be unacceptable, but the sanction of dismissal is in all the circumstances not a fair sanction,⁴⁷⁶ the dismissal will be substantively unfair. Similarly, where the conduct of the employee is

⁴⁷³ 1992 13 ILJ 573 (LAC).

⁴⁷⁴ Unreported case no J1901/99, Labour Court 1999.

⁴⁷⁵ Read *Zandberg v Van Zyl* 1910 (AD) 302 at 309 and compare with *Roschon (Pty) Ltd v Anchor Auto Body Builders CC* 2014 4 SA 319 (SCA); *Ackermans Ltd v Commissioner, South Africa Revenue Service* 2015 6 SA 364 (GP); *Bosch and Another v Commissioner for the South African Revenue Service* (WCC) (unreported case no A94/2012, 20-11-2012) and *Commissioner for the South African Revenue Service v NWK Ltd* 2011 2 SA 67 (SCA). As well read the note of Barry G 2013 *DEREBUS* 25.

⁴⁷⁶ Refer to *Sidumo* above note 180 paras 78-79.

unacceptable, and the sanction of dismissal is in all the circumstances a fair sanction, the dismissal will be substantively fair.

From a labour law perspective, the approach to the consideration of fairness endorsed by the Constitutional Court in the *Sidumo* matter creates an even balance between the competing interests of the employer and the employee, and both are guaranteed the right to fair labour practices.

Viewed from a constitutionally mandated proportionality which acknowledges the link between proportionality, justifiability, rationality and reasonableness, this approach limits constitutional proportionality, although used in guaranteeing the right to fair labour practices. Regarding cases involving criminal misconducts, it is *unjusticiable*,⁴⁷⁷ and therefore irrational and unreasonable because it tramples on the involved employee's rights as a criminal suspect.⁴⁷⁸

The general assessment of the employer's decision at the higher jurisdiction as envisaged in *the Sidumo* finding, if strictly complied with, leaves the law without the need to scrutinise the intricacies of the internal levels of employer discipline.⁴⁷⁹ Thus, the labour law proportionality test does not cut across employer investigation processes. If anything, it leaves the investigation process without legal guideline and relies solely on the discretion of the employer. Without limits, the employer is at liberty to resort to any means of securing evidence including the disregard of constitutional measures enshrined in section 35 of the Constitution. Section 35 fair trial principles enshrine common law proportionality principles as far as matters of criminal law nature are concerned; their ignorance amounts to the negation of proportionality.

⁴⁷⁷ In terms of the due process principles in sections 33 and 35 of the Constitution.

⁴⁷⁸ Thus, the employer had not weighed all possible serious objections to the processes followed; had ignored possible serious alternatives to the processes it took and had failed to test the rational connection between its processes and individual rights at stake. Compare with the argument in Mureinik E 1994 SAJHR 31, 40.

⁴⁷⁹ *Sidumo* above note 180 para 59. Also read *Matsekoleng v Shoprite Checkers (Pty)Ltd* (2013)2BLLR 130 (LAC) paras 54-57. Myburg A & Bosch C *Reviews in the Labour Courts* South Africa 2016 271-282.

The LRA prescripts on procedural fairness in relation to the dismissal of employees who have committed criminal misconducts fail to meet minimum constitutional compliance. They ignore natural justice principles entailing section 35 fairness. They also negate ensued constitutional lawfulness encompassing all grounds of review. In addition, they submit to a narrow interpretation of review by requiring that employer actions should fall within the four corners of the LRA even if they have a negative and therefore unreasonable and irrational impact on employee criminal suspect rights.⁴⁸⁰ They exclude the rationality review of employer disciplinary actions against constitutional reasonableness. Procedural fairness within the LRA prescripts accept employer actions as reasonable, even where they tend to solicit unconstitutionality. Constitutional lawfulness does away with unreasonableness. According to Monyakane, "...the term constitutional reasonableness means that the decisions should be rational and ***constitutionally justiciable*** in that they follow coherent constitutional decision-making processes."⁴⁸¹

Proportionality in relation to criminal persecution, for example, demands that punishment must fit the crime. As an integral to the political theory underlying social contract, it influences the need for consistency and certainty in meting justice for perpetrators of criminal acts and omissions. It prescribes specific procedures to attain consistency and certainty in processes of punishment. The engaged procedures are followed as standard procedures without compromise from the period of suspicion to that of evidence-gathering before the suspect could be arrested and put to trial. Failure to follow them breeds multifarious prejudices, which are threatening to criminal justice.⁴⁸² As far as criminal justice is concerned and

⁴⁸⁰ Entrenched in section 35 of the constitution, among them is the right against self-incrimination. The right against self-incrimination is disregarded in employer disciplinary processes, Grogan J *Dismissal* (2018) 416-425.

⁴⁸¹ Monyakane above note 9 at page 51. Also read Mureinik E1994 *SAJHR* 31,40.

⁴⁸² *De Beers Consolidated Mines Ltd v CCMA* 2000 9 BLLR 995 (LAC); *Fipaza v Eskom Holdings Ltd and Others* (JR 2220/08) (2010) ZALC 66; 2010 31 *ILJ* 2903 (LC) (6 May 2010) *Fipaza N P v Eskom Holdings LTD & others* ; *Eskom Holdings Ltd v Fipaza and*

in pursuit of proportionality, there are principles emphasising consistency in dealing with matters of a criminal law nature. These principles are well organised under common law,⁴⁸³ statutory⁴⁸⁴ and constitutional law⁴⁸⁵ consecutively.

In accordance with the principles of fairness in criminal punishment,⁴⁸⁶ it can be submitted that proportionality in criminal punishment has four aspects of concern. Firstly, it avenges the offended. Secondly, it rehabilitates the offender to make the offender a new person. Third, it shows by example that criminal acts are consistently punishable and, fourth, it sets a precedent that prevents future criminal behaviour. Successfully punishing the offender brings change to those who transgress and maintain the social contract rationales. The indication of criminal punishment is therefore that perpetrators ought to be reformed and not perpetually condemned. Failure to follow the prescribed procedure is successfully tested before court. As far as punishment of criminal perpetrators is concerned, the principle of proportionality enforces constitutional fairness through satisfying entrenched section 35 fairness principles. Thus, the negation of proportionality is a disregard of the twin principles of natural justice—*audi alteram partem*⁴⁸⁷ and *nemo iudex in propria sua causa*.⁴⁸⁸ The recognition and application of both these natural justice principles safeguards suspects' involved rights. At the centre of these rights is employee suspects' right against self-incrimination, ignored in labour law disciplinary processes.⁴⁸⁹

Others (JA 56/10) (2012) ZALAC 40; 2013 4 BLLR 327 (LAC); (2013) 34 ILJ 549 (LAC) (3 October 2012); *Absa Makelaars (Edms) Bpk v Santam Versekeringsmaatskappy Bpk & another* 2003 24 ILJ 1484 (LC) . As well read Keller S K and Harris M P 2005 *Journal of Contemporary Criminal Justice* 6.

⁴⁸³ The previously referred to maxim of *nulla poena sine lege* and its subsidiaries *actus non facit reum nisi mens sit rea*.

⁴⁸⁴ The Major Act is the Criminal Procedure Act 51 of 1977.

⁴⁸⁵ In particular, section 35 of the Constitution.

⁴⁸⁶ Mentioned in *S v Zinn* 1969 2 SA 537 (A) *S v Rabie* 1975 4 SA 855 (A). For a detailed discussion of these principles consider Terblanche S S *The Guide to Sentencing in South Africa* 151. Also see *Shabalala v Attorney General of Transvaal* 1995 2 SACR 761 (CC) para 51.

⁴⁸⁷ Hear the other side.

⁴⁸⁸ No man shall be judged in his own cause, the rule against bias.

⁴⁸⁹ Grogan J *Dismissal* (2018) 416-425.

The state of the limited application of proportionality principle in labour law disciplinary processes leaves unguided employer investigation processes and leads employees to self-incrimination. This is exacerbated by the disguise that employees are being allowed opportunity to be heard while incriminating answers are solicited from them. Writing from a labour law perspective, Grogan⁴⁹⁰ confirms how the right against self-incrimination is regarded insignificant in disciplinary processes.⁴⁹¹ The ensued limited application of proportionality principle in labour law does not exclude the argument that inherent in labour law discipline is the principle of flexibility, allowing employer extensive discretion on the fate of the employment agreement.

It would be fair that the right against self-incrimination would be recognised within employer investigatory powers in matters of a criminal law nature and the related subsequent employee criminal suspects disciplinary hearings. It would be important that the employee criminal suspect's right against self-incrimination is not ignored when such employee draws the investigatory team to it. It would not be mandatory that employees answer to allegations without them pleading self-incrimination. Disciplinary hearings would be considerate of the employees' rights against self-incrimination. Such a consideration in labour law would call for a better and fair disciplinary process which would ultimately move from a flexibility based disciplinary process. Most of the fairness principles based on proportionality would be applicable in employer investigation and hearing processes for employees who committed criminal misconducts.

⁴⁹⁰ Grogan J *Dismissal* (2018) 416-425.

⁴⁹¹ Grogan J *Dismissal* (2018) 416-425.

2 2 4 2 The theory of flexibility and its extent in employment criminal misconducts discipline

The Flexibility principle is the progeny of the common law principle of implied breach of trust between the employer and the employee.⁴⁹² It was a formulation that resulted as a matter of fact and not one of law.⁴⁹³ It was later accepted in law as an implied term in every employer and employee contract.⁴⁹⁴ Some cases that elucidate the operation of this principle in our courts are the cases of *Toyota South Africa Motors (Pty) Ltd v Radebe & others*⁴⁹⁵ and that of *Paper, Printing Wood and Allied Workers Union v Pienaar NO and Others*.⁴⁹⁶

The epicenter for both cases is the emphasis on fair reason to dismiss, due to the breach of the relationship of trust. The breakage in trust is confirmed to have occurred upon the employer-determining the employee's guilt of criminal dishonesty. In these cases, theft and fraud were found to be fundamental breaches of employment contracts and therefore good grounds for dismissal. They were in short, breaches of the relationship of trust between employees and employers. It was maintained in these cases that the employer and employee are parties to an enterprise that produces goods or services to generate profits. That should either party be dishonest to a degree that compromises the enterprise, the instance of a fundamental breach would ensue.⁴⁹⁷

⁴⁹² See cases of *Woods v W.M Car Services (Peterborough) Ltd* [1981] ICR 666 and *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. As well read Frederic R 2015 ILJ 2 262.

⁴⁹³ See cases of *Woods v W.M Car Services (Peterborough) Ltd* [1981] ICR 666 and *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. As well read Reynolds F 2015 ILJ 262.

⁴⁹⁴ See cases of *Woods v W.M Car Services (Peterborough) Ltd* [1981] ICR 666 and *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. As well read Reynolds F 2015 ILJ 262.

⁴⁹⁵ 2000 3 BLLR 243 (LAC) para 43.

⁴⁹⁶ 1993 4 SA 631 (AD) at 638G.

⁴⁹⁷ *Toyota South Africa Motors (Pty) Ltd v Radebe & others* 2000 3 BLLR 243 (LAC) para 43; *Paper, Printing Wood and Allied Workers Union v Pienaar NO and Others* 1993 4 SA 631 (AD) at 638G.

The ensued adoption of purely contractual law principles offered a wide range of choices for both the employer and the employee in cases of a breach of contract by either of the parties to the contract. As far as the contract of employment is concerned, a breach of contract by either party entitles the other party either to accept the breach and sue for damages or to reject the misconduct and sue for specific performance or privileges.⁴⁹⁸ In many cases employers would dismiss employees who broke trust through committing criminal acts. This is because these misconducts constitute material breaches of contract.

The South African law of contract dictates that material breaches of contract constitute repudiation.⁴⁹⁹ Repudiation means that the aggrieved party would renege the contract and therefore force the guilty party out of the contract. Under contract law circumstances, repudiation by a party does not imply termination of the contract.⁵⁰⁰ It is a mere signal that the innocent party has chosen to accept the treachery by the opposite party. The aggrieved party may alternatively seek an order for specific performance, which effectively declares the contract of full force and effect. Through invoking the principle of implied mutual trust and confidence, employers choose as to whether to take drastic acts of dismissal or to condone the employees' actions.⁵⁰¹ The employer routinely capitalises on the flexibility within contract law principles. These principles have greatly influenced the flow of employment law remedies including the remedy of dismissal.

The principle of breach of the relationship of trust between employer and employee is now encapsulated in jurisprudential underpinnings of dismissal law. This jurisprudence promotes the idea that the employer has flexibility⁵⁰² in determining whether to dismiss an employee, even when they committed

⁴⁹⁸ Vettori S 2011 STELL LR 173 at 179.

⁴⁹⁹ Read Vettori S 2011 STELL LR 173 at 179.

⁵⁰⁰ *Nyathi v Special Investigating Unit* 2011 12 BLLR 1211 (LC).

⁵⁰¹ Read cases of *Sidumo* above note 180 paras 78-79 and *Edcon Limited vs Pillmermer NO & Others* 2009 ZASCA 135 ;2010 1 BLLR 1 (SCA).

⁵⁰² See cases of *Woods v W.M Car Services (Peterborough) Ltd* (1981) ICR 666 and *Courtaulds Northern Textiles Ltd v Andrew* 1979 IRLR 84. As well read Reynolds F 2015 ILJ 262 and van Niekerk A 2012 Acta Juridica 102.

criminal acts. In turn, while feeling not bound by the prescripts of criminal justice, employers lost sight of the holistic nature of constitutional demands to the extent that their criminal investigative and disciplinary processes metamorphose towards informality as not to mirror the observance of the nature of criminal justice. This understanding is alive in South African labour law jurisprudence. Accordingly, the jurisprudential interpretation of the labour law employer discretionary powers is that this power is one-sided. Labour law Jurisprudence confirms an impression that there is an inequality of arms between the employer and employee. In this scenario the employer is put on a high pedestal whereas the employee is a mere subject for oppression.⁵⁰³ The employee, for example, is indirectly forced to answer to the employer's accusations at the risk of self-incrimination, owing to the one-sided observance of the principles of natural justice.

It is submitted that, the nature of this centre principle for dismissal—the breach of the relationship of trust—between the employer and the employee mimics a simulated legal scenario. Marking of the effects of its operation on the rights of the criminal suspect employee, it is encapsulated in the maxim *plus valet quod agitur quam quod simulate concipitur*. This maxim means that 'what is actually done is more important than that which seems to have been done.'⁵⁰⁴ This expression bears reference to common law unrestricted employer discretion entitling the employer to ignore the legal substance of fair dismissal and, rather, to concentrate on the ultimate form of discipline. Employer flexibility has found support in labour law jurisprudence as a principle that facilitates quick and efficient dispute resolution and, for that

⁵⁰³ Bearing that employer and employee relationship is unequal by nature, see Davies and Freedland *Kahn-Freund's Labour and the Law* at 18.

⁵⁰⁴ Read *Zandberg v Van Zyl* 1910 AD 302 at 309 and compare with *Ackermans Ltd v Commissioner, South Africa Revenue Service* 2015 (6) SA 364 (GP); *Bosch and Another v Commissioner for the South African Revenue Service* (WCC) (unreported case no A94/2012, 20-11-2012) and *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA). As well read the note of Barry G 2013 *DEREBUS* 25.

matter, labour courts exercise deference on disciplinary decisions.⁵⁰⁵ Comparable to this scenario is the common law *quasi-judicial* administrative action.⁵⁰⁶ It presupposes an existing dispute between two or more parties and involves the same procedure as that for a judicial decision. Unlike the judicial act, however, it does not involve a decision. This disposes of the whole matter by finding upon the facts in dispute and an application of the law to the facts so found, including where required “a ruling upon all disputed questions of law.”⁵⁰⁷

This procedure did not provide the courts with much leeway to use their discretion to protect individual rights. In *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & another*⁵⁰⁸ the Court held that the right to a fair procedure in terms of the LRA requires, “less stringent and formalised compliance than was the case under the unfair labour practice jurisprudence of the Industrial Court.”⁵⁰⁹ Following *Moropane*, the Labour Court in *Avril*⁵¹⁰ held against strict adherence to legal stipulations in labour matters and shunned against following the Industrial Court precedence regarding the strict observation of both of natural justice principles.⁵¹¹

When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by item 4 of the Code, requires the conducting of

⁵⁰⁵ See *Booyesen v SAPS & another* 2008 (10) BLLR 928 [LC]; *Jiba v Minister: Department of Justice & Constitutional Development & Others* 2010 31 ILJ 112 (LC); and *Trustees for The Time Being of the National Bioinformatics Network Trust v Jacobson & others* 2009 30 ILJ 2513 (LC).

⁵⁰⁶ Referred to as delegated judicial action.

⁵⁰⁷ My emphasis.

⁵⁰⁸ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & another* 1997 10 BLLR 1320 (LC); 1998 19 ILJ 635 (LC) 641G. Also read Grogan J *Dismissal* (2014) 265.

⁵⁰⁹ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & another* 1997 10 BLLR 1320 (LC); 1998 19 ILJ 635 (LC) 641G. Also read Grogan J *Dismissal* (2014) 265.

⁵¹⁰ *Avril* above note 6 at 1653 and 1660.

⁵¹¹ *Audi alteram partem* and *nemo iudex in propria sua causa*.

an investigation [on the employee by the employer] and [the] notification to the employee of any allegations that may flow from that investigation. [It also requires that an employee is given] ... an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing. If [the employer's] decision is to dismiss the employee, [the employer should give the employee] the reason for dismissal. The employer should also remind the employee of his or her rights to refer any disputed dismissal to the CCMA or to a bargaining council with jurisdiction; or any procedure established in terms of a collective agreement....There is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like.⁵¹²

Against the jurisprudential understanding and support of the flexibility principle is the argument in this thesis that, in substance, labour law is inextricably part of constitutional law in a wide sense. Consequently, the specific right to fair dismissal must observe constitutional demands in general, unlike what ensues in pursuit of fair dismissal. The means to the required LRA dismissal fairness principles employed, in the employer's criminal investigations and disciplinary mechanisms for dismissal, does not justify the end. The involved mechanisms are illegal and disregard the rights of criminal suspects in the light of the fact that employees suspected of criminal misconduct are also criminal suspects from the constitutional perspective of fair trial.⁵¹³

⁵¹² *Avril* above note 6 at 1653 and 1660.

⁵¹³ See section 35 of the Constitution entrenching the right to fair trial in matters of criminal law nature. Read it with *S v Orrie and Another*, 2005 1 SACR 63(C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56.

The adopted common law principle of implied breach of trust between the employer and the employee has left the employer with a wide discretion to dismiss. Within this scenario, employer powers are protected rather than controlled. The LRA jurisprudential perspective of flexibility reveals that in labour law, there is presumption that a responsible employer carries out its discretion properly⁵¹⁴. This limitation places an exceedingly heavy onus on an aggrieved party, thereby reducing individual ability to seek review of employer decisions.⁵¹⁵

In the attempt to discipline an employee criminal suspect, the employer-enforces criminal justice through LRA provisions which do not allow the employee to insist on the right against self-incrimination. The employee cannot scrutinise the procedures that the employer followed in securing the evidence incriminating the employee even if such procedures were unfair and did not meet section 35 of the Constitution requirements. In this way, the right to fair dismissal provided by the LRA excludes the right to remain silent and the right against self-incrimination.

In effect, the employer's power to dismiss employees in terms of the LRA excludes the employer from observing the rights of employee criminal suspects. Labour law review guidelines are limited to LRA prescripts coupled with what constitutes employer's codes and rules of conduct. In consequence, the basis of these guidelines is the limited questions that the employer ought to traverse before reaching its decisions. These include questions of whether there was a contravention of a rule regulating conduct in the workplace, or of relevance to the workplace. Second, the employer ought to find out if the rule is reasonable and valid. Third, there is a need to establish if the employee was aware of the rule or could reasonably have

⁵¹⁴This is based on the implied principle that courts should exercise deference when reviewing employer's decisions. To the extent that the review of employer processes and decision ought to fit within the four corners of the LRA without regard to other involved justiciable rights.

⁵¹⁵ *Sidumo* above note 180 paras 78-79; *Avril* above note 6 at 838 and 1652 and *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd* & another 1997 10 BLLR 1320 (LC); 1998 19 ILJ 635 (LC) 641G). Also read Grogan J *Dismissal* (2014) 265.

been expected to know it and, fourth, it is necessary to ask if the dismissal was an appropriate sanction.⁵¹⁶

Flexibility with respect to discipline therefore entails the ability of the employer to exercise discretion and choose whether to discipline the employee perpetrator or not. The employer needs not consider the wide constitutional demands concerning the nature of the matter at hand. In this regard, even if a matter is concerning a criminal misconduct, it makes it plausible for an employer to discipline two employees who commit a similar crime differently depending on how the employer feels about each. The employer is not bound to follow strict rules of procedure entrenched in section 35 of the Constitution, nor the principle of equality entrenched in the Constitution. The employer would choose whether to investigate and hold a disciplinary hearing against the employee who committed a criminal misconduct. The choices that the employer makes are hardly questioned as courts exercise deference when tasked to review these decisions in most cases.⁵¹⁷ The flexibility of the employer process is vouched at the need for the employer to quickly and efficiently resolve disputes.⁵¹⁸

The principle of flexibility relaxes the stringent procedural protections against unfair criminal persecutions in cases of a criminal nature. Flexibility⁵¹⁹ limits available employee rights and affords the employee minimum content of the prescribed right. For example, an employee

⁵¹⁶Grogan J *Dismissal* (2018) 213.

⁵¹⁷ See for example, *Matsekoleng v Shoprite Checkers (Pty)Ltd* 2013 2 BLLR 130 (LAC) paras 54-57 *Herholdt v Nedbank Ltd* 2013 34 ILJ 2795 (SCA), *Gold Fields Mining South Africa (Pty) Ltd v CCMA and Others* 2014 35 ILJ (LAC) and other cases decided based on *Sidumo* above note 180 paras 78-79 reasoning. Based on this jurisprudence, the employer could argue that the breakage of relationships between itself and respective employees differed to the extent that the employer chose to keep one and not the other. Thus, argument that employer reasonableness could not be standardised. Employer reasonableness is subjective as opposed to objective standard of reasonableness in PAJA. Unlike employer reasonableness, PAJA reasonableness is based on decisions that are rational, constitutionally justiciable and following coherent constitutional decision-making processes. See Mureinik 1994 *SAJHR* 40.

⁵¹⁸ See *Booyesen v SAPS & another* 2008 10 BLLR 928 (LC); *Jiba v Minister: Department of Justice & Constitutional Development & Others* 2010 31 ILJ 112 (LC); and *Trustees For The Time Being of the National Bioinformatics Network Trust v Jacobson & others* 2009 30 ILJ 2513 (LC).

⁵¹⁹ Even though they both use the term “informal.”

suspected of a criminal misconduct would be notified of the charges against him.⁵²⁰ The employee would be afforded a reasonable opportunity to prepare a response while being assisted where appropriate by experts. The employee would then have an opportunity to state its case. The employee would be informed of the employer's decision and reasons for the employer decision.⁵²¹ The employer on the other hand would not be required to observe formal procedures prescribed for matters of a criminal law nature in pursuit of a fair criminal condemnation. Speaking from the administrative law perspective, Cora Hoexter⁵²² maintains that flexibility process "...seems to be a [mixture of] variability⁵²³ within a framework of conceptualism." In a nutshell, the principle of flexibility waters down the principle of fairness pertinent in matters of criminal law nature, and therefore negates proportionality within criminal justice. It acknowledges some aspects of fairness while to some extent limiting the application of the rest of the requirements.

The employer disciplinary processes on acts of dishonesty have a theoretical foundation that suggests that, regardless of the move from the law of master and servant era,⁵²⁴ the employer still wields extremely unfettered powers over the employee who ought to act according to the employer's commands even in the light of constitutionalised individual rights. If the employee commits a forbidden act classified under criminal misconduct, the employer investigation and discipline is exercised as an appropriate remedy that serves only the interests of the employer. This is allowed in the disciplinary system that embraces the common law prescripts of a master and servant relationship. Integral the prescripts of master and law relationship is the principle of flexibility emanating from the common law of contract perspective. Observance of flexibility without regard to

⁵²⁰ In terms of Item 4 of the Code.

⁵²¹ In terms of Item 4 of the Code.

⁵²² Hoexter C *Administrative Law in South Africa* 363.

⁵²³ She uses the term 'variability' instead of 'flexibility'

⁵²⁴ Grawitzky above note 33.

proportionality allows the employer ample room for discretion in exercising disciplinary powers. The processes that the employer follows in investigating the criminal misconduct, and in disciplinary hearings based on criminal misconducts, do not embrace equality. Hence the employee criminal suspect's rights as a criminal suspect are largely ignored in the long run. This approach is semi anti-criminal justice principles of proportionality mandatory in dealing with matters of a criminal nature. Flexibility as opposed to proportionality hailed the foundations of discipline in work environments.

2 2 4 3 Perspectives of discipline in work environment

As indicated earlier, the starting point for employer and employee relationship is rule based. As a rule, institutions are established because of objectives and aims. It is upon these aims and objectives that codes of conduct are drawn up as terms of reference for regulating the relationship between the employer and the employee. Codes of conduct obviate certain behaviours. They condemn such unwarranted behaviour with sanctions. Upon entry into a contract of employment, employees are orientated with the expected standards which in most cases are inferred in their employment contracts. In most instances, the employer provides newly employed staff with trial periods. For example, there are put in place probation periods of three to twelve months. To test whether the employee is fit for the work, performance gets measured against the policies, procedures, work rules, and performance standards of the institution. It is through such codes of conduct that institutions try to maintain discipline in their employment relationships with their employees. If an employee commits or omits the standard rules, the employment contract terms would indicate that as misconduct.

The ensuing discussions deal with various perspectives attached to the definition of discipline. There are diverse theoretical angles to the definition of discipline attached to the different schools of thought. Some of the

schools of thoughts, share a similar perspective, that discipline in work environments maintains proportionality. Some other schools of thought seem to be insisting that employer discipline must lean on flexibility. Kroon,⁵²⁵ for example, equates the aim of discipline to the elimination of employee's undesirable behaviour. His understanding expresses that the employer would be charged with meting out unpleasant consequences at the employee who flouts institutional rules. The ultimate long-term effect would be that the perpetrator employee and other colleagues would learn that negative performance would also be rewarded negatively.⁵²⁶ This perspective makes punishment the objective of the employer-employee relationship. It therefore regards discipline as an end rather than a means to an end. This is contrary to the principle of proportionality which makes an individual's right the epicentre of discipline. Due to the nature of employer and employee relationship it leaves much to be desired in the hands of the more powerful partner: the employer. Accordingly, Kroon's⁵²⁷ understanding reinforces flexibility principle as the underlying principle in the employer and employee relationship.

Departing from this uneven conception of relations, Grossett⁵²⁸ and Marker⁵²⁹ belong to the corrective discipline school of thought. They theorise that discipline is a means to achieving institutional goals. In the same vein, Grossett⁵³⁰ reckoned that discipline ought to be corrective rather than punitive. He equates employer and employee relationship to a parent and child association, where a parent corrects and guides the child with the aim to help the child not to commit the forbidden behaviour. Grossett's⁵³¹ explanation of what discipline entails is based on the value that institutions attach to their employees. In the instance where an institution considers

⁵²⁵ Kroon J (ed) *General management* 171.

⁵²⁶ Kroon J (ed) *General management* 171.

⁵²⁷ Kroon J (ed) *General management* 171.

⁵²⁸ Grossett M *Discipline and dismissal* 21.

⁵²⁹ Marker A *Raising children to be their best* 18.

⁵³⁰ Grossett M *Discipline and dismissal* 21.

⁵³¹ Grossett M *Discipline and dismissal* 21.

that employees have potential to perform and contribute to the ultimate goals and objectives of the company, the role of employers lean more towards mentoring the employees than punishing them. Thus, discipline becomes a process that enhances performance towards goals and not an end to itself. The function of discipline in such institutions is to ensure that employees contribute effectively and efficiently to the goals of the institution.⁵³²

According to Grossett's⁵³³ proponents, the employer and employee relationship has its point of reference, the binding contract entailing institutional standards. These, as mentioned earlier, are synthesised institutional objectives and aims vis-a-vis employees' duties and rights. It is within this contractual bond that disciplinary measures are expressed. Through these disciplinary measures, the employer monitors and controls employee behaviour and makes sure that an employee adheres to the goals and objectives of the institution. To do this, the employer utilises his right entailed in his authority and duty to ensure that employees adhere to reasonable standards of efficiency and conduct. The only way through which an employer may ensure that employees' conduct conform to the required standards, is to enforce discipline. It may therefore be argued that institutions tend to realise their objectives and goals by *inter alia*, maintaining discipline in the working environment.⁵³⁴

Through monitoring and controlling employees' behaviour, the employer simultaneously investigates possible misconduct in the case of any allegation of untoward behaviour. As the guardian of institutional objectives and aims, the employer would also use discretions and make conclusions regarding the ability of the employee to perform the contracted duties. The employer will decide as to whether the calibre of the employee fits the institutional credentials. Therefore, the employer is at liberty to decide on

⁵³² Grossett M *Discipline and dismissal* 21.

⁵³³ Grossett M *Discipline and dismissal* 21.

⁵³⁴ Grossett M *Discipline and dismissal* 21.

measures to be taken as to whether to impose sanctions. The nature of sanctions to impose, would depend on the nature of the action or inaction entailed. In this aspect, Grossett's⁵³⁵ explanation is analogous to Kroon's⁵³⁶ reasoning that discipline often implies employee's deprivation of valued reward. Thus Kroon⁵³⁷ supports the thought that the principle of flexibility underlies employer and employee relationship.

Concomitant to Grossett,⁵³⁸ Marker⁵³⁹ founds his perspective on discipline to an understanding of a parent-and-child relationship. As mentioned earlier, this relationship is founded on hope and trust where the parent has the best interest of the child at heart. Thus, an employee is trusted to have a potential to perform and that any negative behaviour would be just an unintentional hiccup due to unforeseeable circumstance. In Marker's⁵⁴⁰ understanding, where a child knows its parent's expectations, they would be motivated to exhibit positive behaviour because they feel secure. Consequently, this perspective entails that the employer-employee relationships must aim at building a secure relationship where employees do not regard discipline as the employer's way of catching them. Since the employer serves as a guardian of institutional interests expressed in the rules, the employer, like a parent to a child, will teach the employees what is expected of them. The employer works at mentoring the employees so that they are well behaved and conform to the set institutional rules. The employer is expected to enforce the rules incrementally. First, the employer will be expected to be lenient to the first-time offenders when enforcing discipline.

The application of sanctions would then increase with the frequency of offences by the employee. But the employer will, in a lenient manner, impose disciplinary sanctions upon employees who misbehave, in order to

⁵³⁵ Grossett M *Discipline and dismissal* 21.

⁵³⁶ Kroon J (ed) *General management* 172.

⁵³⁷ Kroon J (ed) *General management* 172.

⁵³⁸ Grossett M *Discipline and dismissal* 21.

⁵³⁹ Marker A *Raising children to be their best* 18.

⁵⁴⁰ Marker A *Raising children to be their best* 18.

prevent a repetition of the undesirable conduct in future. From the above explanation, it is apparent that discipline in the work environment varies in accordance with choices of flexibility perspectives adopted in an institution. At the core of these choices is the legal system in place, which underlies the foundational prescripts of labour law and thus influences their interpretation. It is submitted that the above explanation has exposed that the concept of discipline in work environments is mainly based on two flexibility perspectives, namely the progressive or traditional process and the modern or corrective approach. The rationale for these twists and turns on flexibility perspective is to try and mete out proportionality in disciplinary matters. However, such flexibility would apply as far as the employer criminal investigations and the employer hearing of employee criminal suspect's misconduct for dismissal. In these cases, it would seem the struck measure of proportionality is deemed both scarce and inadequate.

2 2 5 The traditional approach or progressive approach

According to Zack and Bloch⁵⁴¹, progressive discipline maintains a system of escalated penalties. These are made known to employees upon entering a contract of employment. Employees are told in advance that certain behaviours are not tolerated. They are also informed that an employee who transgresses the rules would face certain repercussions. Normally, the penalties are meted out in an incremental manner from less severe punishment to a more severe punishment in the case where the employee repeats forbidden behaviours.⁵⁴² This is best expressed by Marciano's⁵⁴³ outlook on progressive discipline. According to him, progressive discipline entails a policy that emphasises on progression of disciplinary actions taken

⁵⁴¹ Zack A & Bloch R *The arbitration of discipline cases* 84. Also refer to Asherman IG 1982 *Personnel Journal* 528 - 531 at 528.

⁵⁴² Adams G W *Grievance Arbitration* 28; Palmer E *Collective Agreement Arbitration in Canada* 248; Failes M D *Statutory Protection from Unjust Dismissal* 42; Dolan S L and Randall S S *Personnel and Human Resource Management* at 483; Brown D J M and Beatty D M *Canadian Labour Arbitration* at 490.

⁵⁴³ Marciano P L *Carrots and Sticks Don't Work* pages 1-14 where he argues on operant conditioning. (Hereinafter Marciano).

when an employee violates work rules embedded in the employment contract.⁵⁴⁴ Typical of the progressive disciplinary policy is the inclusion of a chronology of measures taken when an employee flouts.

Among these measures is the initial step of verbal warning. This is an informal procedure aimed at ensuring that employees are aware of their forbidden inaction or action. It also aims at the employees' opportunity to remedy their infractions. A verbal warning is normally followed by a written warning, which is a more formal warning.⁵⁴⁵

In terms of this perspective of discipline, an employee who faults for the second instance shows the unpreparedness to have changed negative behaviour. Thus, a written warning is a preliminary step to the consequent formal steps if no improvement in employees' behaviour becomes apparent. In most cases, it would entail an action plan towards tougher steps.⁵⁴⁶ The employer and employee would sign the agreement regarding how the employer would carry out discipline on the employee who has misconducted. Further infraction by an employee would lead to the suspension stage. Suspension as a major punishment comes after the employer has negotiated compliance with the employee.⁵⁴⁷ It is engaged in order to carry out to a further step of termination of employment contract through dismissal.⁵⁴⁸ By its nature, suspension serves as a final warning to the employee who has misbehaved. If there is no improvement, then

⁵⁴⁴ Marciano above note 542 at pages 1-14 where he argues on operant conditioning.

⁵⁴⁵ Fielkow B *Why its Time to Kill Progressive Discipline* 12/06/2018 <https://chiefexecutive.net/why-its-time-to-kill-progressive-discipline> [accessed 21 07 18]. (hereinafter Fielkow). Also read Marciano above note 542 at pages 1-14 as well as Zack A & Bloch R *The arbitration of discipline cases* 84. Also refer to Asherman IG 1982 *Personnel Journal* 528 -531 at 528

⁵⁴⁶ Fielkow above note 544. Also read Marciano above note 542 at 1-14 as well as Zack A & Bloch R *The arbitration of discipline cases* 84. Also refer to Asherman IG 1982 *Personnel Journal* 528 -531 at 528

⁵⁴⁷ Fielkow above 544. Also read Marciano above note 542 pages 1-14 where he argues on operant conditioning as well as Zack A & Bloch R *The arbitration of discipline cases* 84. Also refer to Asherman IG 1982 *Personnel Journal* 528 -531 at 528

⁵⁴⁸ Fielkow above note 544. Also read Marciano above note 542 pages 1-14 as well as Zack A & Bloch R *The arbitration of discipline cases* 84. Also refer to Asherman IG 1982 *Personnel Journal* 61 July 528 -531 at 528

termination would follow.⁵⁴⁹ In certain circumstances the progressive disciplinary system supports the application of serious measures of discipline such as the termination of contract of employment without having gone through other measures.

As Asherman⁵⁵⁰ reckoned, progressive discipline exposes three common characteristics. Namely: punitive discipline, negative feedback and labelling of perpetrators in terms of their negative behaviour.⁵⁵¹ These aspects are concomitant to the underlying principle of flexibility more than proportionality.

2 2 5 1 Advantages of employer traditional approach to discipline

The traditional approach bears many advantages, especially for the employer. It sustains a system where the underlying foundations of labour law are largely supported by master and servant relationships rules.⁵⁵² This is because the master and servant models of relationship enforce fear and keep employees on their toes for fear of being negatively disciplined if they transgress the stipulated rules.⁵⁵³ At the centre of the traditional approach to discipline is the urge to protect employer discretion and flexibility to retain or dismiss an employee who has defaulted. This approach maintains strict adherence to institutional rules and regulations imposed on the employee by the employer. It does not pay regard to mitigating circumstances underlying the employee's misconduct. There would be no need to consider circumstances under which the employee committed the misconduct.

The relevance of common law prescripts of master and servant in the current systems cannot be undermined. As Deakin⁵⁵⁴ exposed, the

⁵⁴⁹ Marciano above note 542 at 31-43.

⁵⁵⁰ Asherman IG 1982 *Personnel Journal* 528 -531 at 528.

⁵⁵¹ Asherman IG 1982 *Personnel Journal* 528 -531 at 528.

⁵⁵² Deakin S *The Contract of Employment* 7; *Addis v Gramophone Co. Ltd.* 1909 (AC) 488, held to be correctly decided in *Johnson v. Unisys Ltd.* [2001] IRLR 279.

⁵⁵³ Deakin S *The Contract of Employment* 1-7. Also see *Addis v Gramophone Co. Ltd.* 1909 (AC) 488 and *Johnson v. Unisys Ltd.* [2001] IRLR 279.

⁵⁵⁴ Deakin S *The Contract of Employment* 1-7. Also see *Addis v Gramophone Co. Ltd.* 1909 (AC) 488 and *Johnson v. Unisys Ltd.* [2001] IRLR 279.

common law played a major part in shaping the law of employment in the twenty first century.⁵⁵⁵ Embedded in the founding principles of today's labour law are the same challenges accustomed in common law because of the hybrid nature of labour. As it developed with time, the common law traditional prescript continues to influence its interpretation and thus its application. Deakin mentions that in current times, courts turn to acknowledge the relevance of these customary prescripts in the interpretation.⁵⁵⁶ In particular, Deakin writing from the British perspective observes that,

*the role played by the eighteenth and nineteenth-century poor law and master and servant legislation in shaping the common law of employment can be discerned, along with the persistence of the service model long into the twentieth century, in large part as a result of the quasi-disciplinary jurisdiction retained by the courts under the Employers and Workmen Act 1875. While at every stage, legislation has built on and incorporated the common law, statutes themselves have a curious half-life, continuing to influence legal development long after their formal repeal.*⁵⁵⁷

His analysis is very much akin to South African labour law perspective. South African labour law bears its origins from common law. South African common law embraced the principle of master and servant because its common law originated from its commonwealth inheritance of legal prescripts in addition to the Roman-Dutch law.⁵⁵⁸

In the light of this explanation, it is trite to argue that the rationale of this principle is that the master remains in control of the relationship between self and the servant. The servant maintains the status of obedience. It was

⁵⁵⁵ Deakin S *The Contract of Employment* 1-7. Also see *Addis v Gramophone Co. Ltd.* 1909 (AC) 488 and *Johnson v. Unisys Ltd.* [2001] IRLR 279.

⁵⁵⁶ Deakin S *The Contract of Employment* 1-7. Also see *Addis v Gramophone Co. Ltd.* 1909 (AC) 488 and *Johnson v. Unisys Ltd.* [2001] IRLR 279.

⁵⁵⁷ Deakin S *The Contract of Employment* 7. Also see *Addis v Gramophone Co. Ltd.* 1909 (AC) 488 and *Johnson v. Unisys Ltd.* [2001] IRLR 279.

⁵⁵⁸ To find the origins of South African Common Law, read Schreiner M C *The Contribution of English Law* 10.

the master who controlled the beginning and the end of the relationship. The servant who was equated to a pauper ought to be ordered by the master as to what ought to be the conditions of work. Rare interference on the execution of the agreement was expected from the servant or anyone else. In short, justice meant the will of the employer and not the servant.

2 2 5 2 Disadvantages of employer traditional approach to discipline

The traditional approach to discipline bears multiple challenges as far as fairness is concerned. It has a multiple of unfair results from employees' perspective. Progressive discipline adheres to punitive discipline, which encourages top-to-bottom disciplinary measures.⁵⁵⁹ No attempt is made by the supervisor or employer to understand the employee, regarding the cause of the misconduct so that a reasonable decision as to whether to impose sanctions or not, may be taken.⁵⁶⁰ Once the institutional rule or regulation has been broken, incremental punishment is imposed.

As shown above, such traits survive within the master-servant relationship prescripts. They are a top-down unilateral communication stream emanating from the employer to the employee.⁵⁶¹ Such a relationship in the working environment will mean that the supervisor will give orders which may not be questioned by subordinates. A progressive approach to discipline ⁵⁶² instils behaviour through fear of punishment because employees' minds register the punitive aspects. They comprehend that failure to adhere to rules and adapt to necessary changes as required by the employer would mean that the employer would engage harsher punishment.⁵⁶³

⁵⁵⁹ Asher RF 1983 *FBI - Law - Enforcement -Bulletin* 52 April 12 – 15 at 12 (herein after Asher). As well refer to Fielkow above note 544.

⁵⁶⁰ Asher above note 558 at 12. As well refer to Fielkow above note 544.

⁵⁶¹ Asher above note 558. at 12. As well refer to Fielkow above note 544.

⁵⁶² Asher above note 561 at 12. As well refer to Fielkow above note 544.

⁵⁶³ Asherman IG 1982 *Personnel Journal* 528 -531 at 529.

Fear of punishment aligns employees and motivates them to comply with employer commands.⁵⁶⁴ Effectively, punitive measures promote demotivation. Employees would be discouraged and demoralised and so become unproductive. In an endeavour to limit the processes of punitive discipline, the disciplinary process will become a process of inconsistencies. Asherman⁵⁶⁵ opines that circumstance underlying this kind of disciplinary process allow employee abuse, where instead of acculturating employees to change their behaviour from negative to positive, employers would utilise the process to promote discouragement and work towards removing employees from employment. Managers would work at making their job easier through orchestrating the removal of the supposed problematic employee. It may therefore be enough to state that employees under these conditions do not have labour rights, namely the right to fair labour practice and the right to be fairly heard, for example at a departmental hearing.

Supervisors using progressive discipline generally provide feedback only when an employee's performance is below standard.⁵⁶⁶ The progressive discipline processes encourage only negative responses. If an employee behaves well in accordance with institutional standards, nothing is said to encourage the performing employee. As Daniels⁵⁶⁷ stated, the importance of feedback in work environment cannot be underrated. Due to consistent feedback, employees enhance their performance. Negative feedback in most cases disregards previous positive work performance and overrates punitive measures.⁵⁶⁸

When employees are not reassured, they work in fear and are not sure of their performance. They do not know as to when the employer would strike because they are not sure as to whether their behaviour is still at the level

⁵⁶⁴Asherman IG1982 *Personnel Journal* 528 -531at 529.

⁵⁶⁵Asherman IG 1982 *Personnel Journal* 528 -531at 529.

⁵⁶⁶Asherman IG 1982 *Personnel Journal* 528 -531at 529.

⁵⁶⁷ Daniels AC *Bringing out the best in people* 101.

⁵⁶⁸Capozolli TK 1997 *Supervision* 58 16 – 26 at 17.

appreciated by the employer and within the institutional rules and regulations.⁵⁶⁹

Progressive disciplinary processes create lacunae for a deliberate labelling of employees by managers who may dislike them. Ashermen⁵⁷⁰ confirms that in certain instances, managers tend to label employees rather than describe their unacceptable behaviour. Should an employee commit a misconduct at a certain stage, chances are that the employee will be labelled as a culprit and bear that label. Even if such an employee corrects that behaviour by acting positively and responsibly, other people's perceptions of the employee may not change.

If employees are always criticised, they will soon get the impression that they do not matter, as only the things they do wrong are recognised. This means that the relationship between a supervisor and a subordinate can be permanently marred by ill-feeling.⁵⁷¹ Labelling is deceptive, for employees carry their labels with them from department to department and from one institution to another.⁵⁷² In other words, labels attached to employees may remain with those employees for a very long time and in some instances may affect their future prospects of employment as the very same supervisor may be the subordinate's reference.

It is submitted that labour law labelling of criminal suspects is antithetical to constitutional principles of fairness for criminal suspects. Constitutional fairness demands that labelling of individuals as criminals be subjected to cautious and discreet approaches⁵⁷³ to ensure that it does not encroach individual rights entrenched in the Bill of Rights.⁵⁷⁴ The review above

⁵⁶⁹ Asherman IG 1982 *Personnel Journal* 528 -531 at 528.

⁵⁷⁰ Asherman IG 1982 *Personnel Journal* 528 -531 at 528.

⁵⁷¹ Ströh EC "Personnel motivation: strategies to stimulate employees to increase performance" 2001 *Politeia* 20(2) 59 – 74 at 66.

⁵⁷² Asherman IG 1982 *Personnel Journal* 528 -531 at 528.

⁵⁷³ For an understanding of these theories and their application, see for example, Wellford, C Vol 22 (3) *Social Problems* 332-345.

⁵⁷⁴ See section 35 of the Constitution entrenching the right to fair trial in criminal matters. Read it with *S v Orrie and Another*, 2005 1 SACR 63 (C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56.

indicates that a purely traditional approach tallies with Rycroft and Jordaan's⁵⁷⁵ conclusion that labour law criminal persecution processes are by nature "authoritarian and paternalistic."⁵⁷⁶

Concomitant to this observation is the exposure that the correction and rehabilitation themes of progressive discipline are imported from the theories of criminal law.⁵⁷⁷ This is evident in Alexander,⁵⁷⁸ who to some extent compared the themes of correction and rehabilitation in labour law to that of criminal corrective discipline, where he states,

Most simply put, the principle of corrective discipline requires that management withhold the final penalty of discharge from errant employees until it has been established that the employee is not likely to respond favourably to the lesser penalty. To draw an analogy from criminal, corrective discipline is somewhat like a habitual offender statute. It presupposes that the preliminary purpose of punishment is to correct wrongdoing rather than to wreak vengeance or deter others.⁵⁷⁹ Corrective discipline assumes that the employer as well as the employee gains more by continuing to retain the offender in employment, at least for a period of future testing, than to cut him from the rolls at an earliest possible moment.⁵⁸⁰

There are however several expositions regarding this comparison. The first to note is that labour law jurisprudence tends to down-play or ignore the idea of employee punishment.⁵⁸¹ To do that, some scholars put more emphasis on the "neutral desire to soften and disguise the pain of punishment on employees by [describing it as if it is more beneficial to employee] in terms of rehabilitation."⁵⁸² The main aim for this explanation, has been described as shying away from a clear exposition that labour law

⁵⁷⁵Rycroft A & Jordaan B *A guide to South African labour law* (1992) 178

⁵⁷⁶Rycroft A & Jordaan B *A guide to South African labour law* (1992) 178. As well see Asher above note 558 at 12.

⁵⁷⁷Alexander D 1956 *9th Annual Proceedings of the National Academy of Arbitrators* 79-80 (hereinafter Alexander); Adams G W *Grievance Arbitration* 6; England G 1978 *Alberta Law Review* 16, 470-520, at 473; Heenan *Unjust Dismissal* 156.

⁵⁷⁸Alexander above note 576 at 79-80.

⁵⁷⁹Emphasis added.

⁵⁸⁰Alexander above note 576 at 79-80.

⁵⁸¹Adams G W *Grievance Arbitration* 30.

⁵⁸²Adams G W *Grievance Arbitration* 30.

discipline to some extent has to subscribe to criminal law theories.⁵⁸³ This indirect application of criminal law theories has been responsible for the accommodated lack of observation of the underlying rationales of criminal condemnations by the employer who seeks to condemn the defaulting employee.⁵⁸⁴

The widespread prevalence of employers' discretion to not comply with rationales of criminal punishment in civil justice pursuits of matters of criminal law nature has resulted in many interpretations of punishment.⁵⁸⁵ These have led to the emergence of differing perspectives on rehabilitation in the context of labour law.⁵⁸⁶ Some scholars, writing from the labour law perspective, have insisted that the concept of rehabilitation as a purpose of punishment be based on a criminal theory understanding.⁵⁸⁷

A renowned scholar on criminal justice sentencing from South African perspective threshed out the rationales of various sentencing rationales as well as their purposes.⁵⁸⁸ He expounded that in criminal justice,⁵⁸⁹ rehabilitation is pursued as a purpose of punishment if the sanction actually has the potential to achieve it.⁵⁹⁰ However, in the case where a crime is of a very serious nature and long terms of imprisonment become appropriate, rehabilitation ceases to be the objective of punishment and deterrence is recognized as the goal.⁵⁹¹

It is submitted that his explanation marks the distinction between deterrence and rehabilitation in criminal justice.⁵⁹² He maintained that deterrence has

⁵⁸³ Eden G 1992 *Relations industrielles* 514.

⁵⁸⁴ See Ashworth A *Principles of Criminal Law* Page 1. Read, Henry M and Hart Jr 1958 *Law and Contemporary Problems* 401-441; Wellford C 1975 *Social Problems* 332-345; Glanville W *The Cambridge Law Journal* Vol 42, Issue 1 pp. 85-95

⁵⁸⁵ Interpretations of punishment.

⁵⁸⁶ See Eden G 1992 *Relations industrielles* 514.

⁵⁸⁷ Alexander above note 576 at 79-80; Adams G W *Grievance Arbitration* 6; England G 1978 *Alberta Law Review* 16, 470-520, at 473; Heenan *Unjust Dismissal* 156.

⁵⁸⁸ Terblanche S S *The Guide to Sentencing in South Africa* 348-349 read with Eden G 1992 *Relations industrielles* 514

⁵⁸⁹ See Eden G 1992 *Relations industrielles* 514 compare with Snyman CR *Criminal law* (1989) 22. As well see Alexander above note 576 at 79-80.

⁵⁹⁰ Terblanche S S *The Guide to Sentencing in South Africa* 348-349.

⁵⁹¹ Terblanche S S *The Guide to Sentencing in South Africa* 348-349.

⁵⁹² Terblanche S S *The Guide to Sentencing in South Africa* 348-349.

two components, namely, to deter the offender from relapsing, and to deter the other would-be offenders.⁵⁹³

Deterrence is therefore seen as a concept in labour law that retains its criminal law theory foundations and is used as the rationale in the punishment of faulted employees.⁵⁹⁴

However, there is yet an anomaly posed in the labour law application of deterrence. Even though employers are clothed with judicial powers unlike criminal courts, they cannot send an employee criminal suspect to prison.⁵⁹⁵

Under these circumstances, employers can decide to punish misconduct for deterrence; a matter exercised in criminal justice under stringent circumstances. Within their flexible powers they can opt for stringent punishments which are worse than simple imprisonment. They can condemn employee suspects of crime through dismissal and later hand the evidence to police to prosecute the employee suspect of criminal misconduct. The cases of prosecution are an exemplary case of these detrimental punishments because they ended in double punishments.⁵⁹⁶ The possibility of this ending once more exemplifies lack of fairness in labour law prescripts.

In most labour law cases, which are progressive discipline based,⁵⁹⁷ deterrence is reflected as an overriding factor for punishment of the defaulted employee criminal suspects. This is in the instance of gross misconduct such as misconducts of a criminal nature.⁵⁹⁸ A defaulting

⁵⁹³ Terblanche S S the Guide to Sentencing in South Africa 348-349.

⁵⁹⁴ Terblanche S S the Guide to Sentencing in South Africa 348-349.

⁵⁹⁵ within the CPA criminal offences schedules. Schedules I to III of the CPA encompassing crimes classified under LRA jurisprudence as dishonesty misconducts, for example misconducts relating to theft.

⁵⁹⁶ To appreciate the danger of double punishment, see para 4 3 1 on the parallel nature of criminal misconducts dismissal processes.

⁵⁹⁷ South African labour law jurisprudence is based on the law that expresses progressive discipline. Consider Item 7 of Schedule 8 of the Labour Relations Act, 66 of 1995; *Sidumo* above note 180 paras 78-79.

⁵⁹⁸ On the concept of employer implied intorability read Newaj K 2016 *THRHR* 429-442 at 433; *De Beers Consolidated Mines (Pty) Ltd v CCMA & Others* 2000 9 BLLR 995 (LAC) at para 17; as well, *Edcon Limited vs Pillmer NO & Others* 2009 ZASCA 135 ;2010 1 BLLR (SCA) , as well see Eden G 1992 *Relations industrielles* 514.

employee for example, would be disciplined to the extent that the sanction would make a statement that if any other employee acts similarly, the employer would not tolerate the behaviour and would react harshly to the wrong doer.⁵⁹⁹ The employee criminal suspect in turn would be condemned as a criminal and be dismissed from employment. If the employee criminal suspect is condemned as a thief, the employee criminal suspect would therefore be labelled a thief even if imprisonment would not be the ultimate sanction, as it would have been in criminal justice system.

The above-mentioned characteristics of progressive discipline are affirmed in a plethora of authorities which also mete out criticism against the *use of deterrence and similar punishments* for organisational behaviour purposes.⁶⁰⁰ Eden⁶⁰¹ for example, has summarised the criticisms against progressive discipline as follows:

It is ineffective in eliminating undesirable behavior. It serves to suppress behavior temporarily rather than change it permanently. Once the threat of punishment is removed, the undesirable behavior will return to force.

It may result in escape or avoidance by the employee (e.g. absenteeism, turnover).

It generates emotional behavior, often directed against the person who administers the punishment (e.g. Sabotage).

⁵⁹⁹ For example, see *De Beers Consolidated Mines (Pty) Ltd v CCMA & Others* 2000 9 BLLR 995 (LAC) at para 17.

⁶⁰⁰ Booker G S 1969 *Personnel Journal* 48(7) 525-529, at 526-527; Wheeler H N 1976 *Industrial Relations* 15 235-243, 235-236; Dessler G *Human Behaviour: Improving Performance at Work* 89-90; Gibson J L et al *Organisations* 82; Arvey R D and Ivancevich J M 1980 *AMR* 123-132, 125-131; Kerr S and Slocum J W *Controlling the Performance of People* 123; Luthans F *Organisational Behaviour* 261-286; Asherman IG 1982 *Personnel Journal* 528 -531 at 529; Arvey R D and Jones A P *The Use of Discipline in Organisational Settings* 368-383. Dolan S L & Randall S S *Personnel and Human Resource Management* at 278; Ivancevich J M & Mattison M T *Organisational Behaviour* 181.

⁶⁰¹ Eden G 1992 *Relations industrielles* 514, 517-518.

It can turn the person doing the punishing into an “aversive stimulus” with the result that the person cannot take any action that will be perceived as positive reinforcement.

It may have a disastrous effect on employee satisfaction and morale

It is difficult for supervisors to administer. It is stressful for them to handle, and difficult to switch roles from punisher to positive reinforcer.

It may be used as a mechanical process to justify termination.

Supervisors who use discipline as their preferred strategy may be viewed negatively by upper management because of a perceived overreliance on aversive control systems.

It can lead to an increase in the expensive, time consuming grievances.

It is often thought to be unethical and non-humanitarian.⁶⁰²

The ensuing progressive discipline challenges have triggered the need to improve on disciplinary processes. It is this concern that led to a formulation of a new school of thought based on corrective steps on employee discipline. This new school of thought removed the room for deterrence-based discipline endowed in progressive discipline. Corrective discipline places more focus on correcting employee behaviour from as early as the time when employees default. Employees are hence encouraged not to default from consistent training.⁶⁰³

2 2 5 3 Modern approach or corrective approach

According to Rycroft & Jordaan,⁶⁰⁴ the corrective approach accords to modern employment practices. They argue that current times encourage more enlightened approaches to the formulation of standards for the maintenance of discipline.⁶⁰⁵ It is submitted that such approaches seem to

⁶⁰² See Eden G 1992 *Relations industrielles* 514, 517-518.

⁶⁰³Rycroft A & Jordaan B A *guide to South African labour law* (1992) 179.

⁶⁰⁴Rycroft A & Jordaan B A *guide to South African labour law* (1992) 179.

⁶⁰⁵ Rycroft A & Jordaan B A *guide to South African labour law* (1992) 179.

be aiming at correcting the unwanted behaviour as opposed to punishing the perpetrators. It is further submitted that, if this approach is adopted, the employer would need not venture into punishment that borders on illegality. Illegality arises due to employer tendencies of avoiding standards that must be observed in meting out punishment on employee criminal suspects.

What the employer would be ordered with, would be basically, to put emphasis on corrective discipline, where appropriate, with the aim not to punish, but to encourage both the employee and employer to act together and find solutions to occurring work problems. In cases of complex challenges such as dishonesty cases, the employer due to the lack of expertise and the involved extensive processes would hand matters to appropriate authorities, for example, the SAPS.

As opposed to progressive discipline-based processes where employees are viewed as objects of work challenges, employers following corrective approach would rather see employees as part of the body of the institution and treat them from a solution-based perspective.

Employees would be perceived as agents of positive change to the workplace. The results to this change of perspective would be that employees would desist from offending but contribute tremendously to institutional productivity.

Employers focussing on corrective approach discipline would rather remedy the circumstances surrounding the fault that occurred and try to remedy its repeated occurrence. Such employers would not perceive employees as potential defaulters who ought to be punished. The fault in issue would be understood to constitute a challenge to both the employee and employer.

In cases where an employee commits a misconduct, the employer would find the reasons for the commission of the misconduct so that it is not repeated. The employer would evaluate the circumstances to determine the employee's intentional extent and, if it is criminal, involve police from the initial investigations.

Through evaluating the circumstances, the employer would find out if the occurrence was not beyond the employee's control. The underlying factors would be the central focus for eradication and would need the employer and employee to work at eradicating them and not at eradicating the defaulting employee.

From the same perspective as Rycroft & Jordaan,⁶⁰⁶ Asherman⁶⁰⁷ is of the opinion that the eradication of circumstances surrounding the employer's behaviour would mitigate the employee's negative behaviour. To add on, the employer would be saved from pondering into criminal investigative authority and leave it to appropriate bodies. This is called proactive management.

The employee would then respond positively to corrective discipline measures to avoid a more severe situation.

Corrective approach credentials reflect a different approach to that followed by the progressive approach. However, not everyone agrees. Some writers found corrective discipline fallacious.⁶⁰⁸ They found both corrective and progressive discipline disciplinary approaches to share close rationales, where the top-bottom approach is still at play.

From that perspective, Wheeler⁶⁰⁹ exclaimed:

Arbital writers expound the distinction between [progressive discipline or] authoritarians' discipline, which is based on fear, and corrective discipline, which attempts to instil 'self-discipline' in the employee. They deny that the purpose of corrective discipline is punishment. Yet it seems that corrective discipline is nothing more, or less, than a sophisticated form of punishment which, in the case of the disciplined employee, attempts to make full use of the effect of anticipated punishment described by Berkowitz [as a] negative incentive causing

⁶⁰⁶Rycroft A & Jordaan B A *guide to South African labour law* (1992) 179.

⁶⁰⁷ Asherman IG 1982 *Personnel Journal* 528 -531at 530.

⁶⁰⁸ See for example, Wheeler H N 1976 *Industrial Relations* 15 235-243, at 240 and Asherman IG 1982 *Personnel Journal* 528 -531at 531.

⁶⁰⁹ Wheeler H N 1976 *Industrial Relations* 15 235-243, at 240.

*the suppression of actions that might bring about unwanted consequences.*⁶¹⁰

Wheeler's⁶¹¹ observation tallies well with the interpretation of corrective discipline as a system based on the application of disciplinary sanctions. However, corrective discipline maintains that a disciplinary sanction should be aimed at correcting the employee's behaviour and not at working at the employee's removal from the employer's institution.⁶¹² This perspective, like the progressive discipline process, is from top to bottom. It is only the employee's behaviour that requires correction in both approaches.⁶¹³

Under these systems, the employer is perceived as targeting the employee's bad behaviour and not the employee. This is because disciplinary sanctions in these disciplinary processes are regarded as stimuli for employee change in behaviour. Both corrective and progressive disciplinary measures are supposed to mould employee behaviour and not employer behaviour. According to Asherman,⁶¹⁴ corrective measures are not simply punishment or steps towards the termination of service as emphasised in progressive disciplinary approaches.⁶¹⁵

Proponents of this school of thoughts argue further that corrective discipline regards disciplinary sanctions as a way to clarifying the employer's expected behaviour and as a way to express the extent of employer's wrath in cases where employees default.⁶¹⁶ This understanding resonates with the possible understanding of the corrective approach. South African labour law uses corrective approach to employee discipline.⁶¹⁷ It is possible to view corrective discipline as an improvement on progressive discipline.

The improvement can be observed from the fact that the employer's concern when disciplining the employee is impersonal. This analysis

⁶¹⁰Wheeler H N 1976 *Industrial Relations* 15 235-243, at 240.

⁶¹¹Wheeler H N 1976 *Industrial Relations* 15 235-243.

⁶¹²Rycroft A & Jordaan B A *guide to South African labour law* (1992) 182.

⁶¹³ Rycroft A & Jordaan B A *guide to South African labour law* (1992) 182.

⁶¹⁴ Asherman IG 1982 *Personnel Journal* 528 -531 at 531.

⁶¹⁵ Asherman IG 1982 *Personnel Journal* 528 -531 at 531.

⁶¹⁶Cameron D 1984 *Personnel Journal* 37- 39 at 39.

⁶¹⁷ Rycroft A & Jordaan B A *guide to South African labour law* (1992) 182.

indicates that this approach bears just slight improvements on the traditional approach. Against the above understanding outlined in this thesis, it still negates the need to respect and consider employees as individuals who have rights to be respected just as entrenched in section 35 fair trial rights entail. In doing so, corrective discipline at the end enables the employer's disciplinary measures to disregard individual rights.

The employer considers the employee's behaviour as far as it is punishable by rules and regulations. For instance, where an employee commits criminalised acts, the employer would discipline the employee and would not keep the employee in the service. In this way corrective discipline can be compared to the reformatory theory of punishment. Accordingly, Snyman explaining reformatory theory mentioned that, it is a means to reform a criminal offender so that it may become a normal law-abiding member of the community once again.⁶¹⁸ Arguing from a criminal law perspective, Snyman's⁶¹⁹ observation is grounded on principles of proportionality threading punishment of criminal perpetrators. His analysis on criminal punishment may seem analogous to the understanding cast on the corrective discipline approach. However, it is based on extensive criminal processes aimed at satisfying aspects of proportionality principle.

Even though there is a major theoretical commonness between discipline in labour law and criminal law sanctioning, procedures adjacent to each have differences. Labour law follows informal procedure processes which lean towards civil procedure at the expense of defaulting constitutionally set proportionality-oriented principles in criminal procedure. Criminal law is more formal and strictly adheres to constitutionally entrenched section 35 fairness principles. This thesis criticises this disparity as unjust with respect to the employer's investigation and disciplinary hearing of criminal misconduct with the aim to dismiss an employee suspected of committing

⁶¹⁸ Snyman CR *Criminal law* (1989) 22.

⁶¹⁹ Snyman CR *Criminal law* (1989) 22.

any category of criminal acts. This approach causes inequalities in reaching justice for the involved employee criminal suspect.⁶²⁰

2 2 5 4 The industrial relations perspective on employment discipline

Overreliance on corrective or progressive discipline in labour relationships has been criticised by the new school of thought outside labour law management systems, such as the team based approaches to organisational management.⁶²¹ The industrial relations perspective on employment discipline is one of the major schools of thought intending to bring a change in labour relations and hence a foreseen tremendous change on the concept of discipline in labour law. Paul Marciano is a renowned proponent of this school of thought.⁶²²

This thesis considers his model a possible foundation towards a new perspective of criminal employee discipline. He opines, amongst others, that employees must be engaged in organisational development. His philosophy maintains that behavioural solutions must come out of a cultivation and management of human capital. He deposes punishment-based⁶²³ leadership as tantamount to transactional leadership, which it is submitted in this thesis that it cannot pass muster in democratic states like South Africa with a human rights-based Constitution.⁶²⁴ According to Marciano;

Carrots and sticks” refers to using rewards and punishment to motivate others.⁶²⁵ This system is based on the principles of operant conditioning. Similarly, there is the expression “carrot-on-a-stick,”

⁶²⁰ South African Constitution is against inequality. See section 9 of the Constitution bearing the equality clause.

⁶²¹ Marciano above note 542 at 26-27 and 75-76. As well as Marciano P L& Wingrove C *Super Teams: Using the Principles of RESPECT* 119-132.

⁶²² Marciano above note 542 at 5.

⁶²³ Carrots and sticks. You perform I give you a carrot. You offend I punish you.

⁶²⁴ Read Marciano above note 542 at 1-2 and Marciano P L& Wingrove C *Super Teams: Using the Principles of RESPECT* 119-132.

⁶²⁵ Similar to progressive discipline model used in South African labour law.

which conjures up the image of a carrot tied to a stick held just beyond the reach of a donkey to encourage the animal to go faster.⁶²⁶ In organizations, “carrots” refer to rewards or incentives dangled in front of employees to motivate them to strive toward some goal. These incentives range from coffee mugs to lucrative financial bonuses and everything in between. The obvious assumption is that employees are actually motivated by the particular carrot being offered. [On the other hand, it can be said that the expectation is that employees are deterred from offending the institutional rules in fear of the apprehended punishment.]⁶²⁷

Against carrots and sticks model of discipline, Marciano proposes team-based approaches to organisational management.⁶²⁸ He comes across as a supporter of transformational leadership entrenched in the Preamble read with section 1, 8, 9, 23, 33, 35 and 195 of the South African Constitution. South African constitutional human rights-based perspective of leadership entrenches transformational leadership based on principles that encourage checks and balances on the exercise of power—be it on private or public interactions.

The epicentre of these principles is the respect of individual rights expressed in the Bill of Rights. As far as the persecution of criminal suspects is concerned, section 35 of the Constitution entrenches the right to a fair trial. To accord with these constitutional demands the exercise of employer criminal investigative and disciplinary powers on employees who committed criminal misconducts needs to observe constitutional fairness. In chapters one, two and three, it was argued that such fairness does not depend on a piecemeal interpretation of the constitutional clause of fairness in section 23(1) but on wider observance of fairness in accordance with the constitutional transformative objectives in the Preamble, section 1, 8, 9, 23, 33, 35 and 195 of the Constitution. Such approach will do away with

⁶²⁶ An emulation of master and servant relationship.

⁶²⁷ Marciano above note 542 at 1-2.

⁶²⁸ Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 148-156 and 200 -217.

draconian processes that are avoiding the necessary checks and balances. The epicentre of transformational leadership perspective regarding criminal persecution is pursuance of proportionality.

The CPA operationalises section 35 of the Constitution and unpacks the procedure satisfying the principle of proportionality. The constitutional objective of rights-based transformation makes it mandatory that the transformational principles are considered in day-to-day legal interactions, even in private governance.⁶²⁹

The relevant constitutional sections emphasising either a horizontal⁶³⁰ or a direct⁶³¹ application of a rights-based constitutional objective in common law-influenced matters of a private nature are sections 8 (2), (3) and 39(2) of the Constitution.

In some instances, our jurisprudence exposed a mixed approach where both direct and horizontal approaches are employed. The invocation of either section 8(2) and (3) or 39(2) of the Constitution would mean that these sections can be resorted to, in influencing constitutionally compliant private engagements. The use of these sections in this perspective would suggest that the constitutional objectives introduce a new perspective of morals observed in private engagements hence the requirement that private dealings ought not be *contra bonos mores*.

On this basis, it is argued in this thesis that an attempt by any law to promote negation of constitutional principles would deem such a law unconstitutional. In particular, a contract that bases its execution on principles seeking to exclude entrenched principles is *contra bonos mores*. In the light of this argument, it would be contrary to the Constitution to promote employer flexibility in disciplinary processes affecting matters of a criminal law nature at the expense of the constitutional principle of

⁶²⁹ See *Du Plessis v De Klerk* 1996 3 SA 850 (CC) ; *Khumalo v Holomisa* 2002 5 SA 401 (CC) ; *Barkhuizen v Napier* 2007 5 SA 323 (CC) and *NM v Smith* 2007 5 SA 250 (CC).

⁶³⁰ *Du Plessis v De Klerk* 1996 3 SA 850 (CC) ; *Barkhuizen v Napier* 2007 5 SA 323 (CC) and *NM v Smith* 2007 5 SA 250 (CC).

⁶³¹ *Khumalo v Holomisa* 2002 5 SA 401 (CC).

proportionality entrenched in section 35 of the Constitution. If anything, the principle of proportionality is mandatory, dealing with punishment in matters of a criminal law nature. Such an attempt would be criticised as contrary to constitutional fairness expected in employers' criminal investigative procedures and disciplinary hearing processes involving employees suspected of criminal misconduct.

The employer's power to investigate an employee's criminal misconduct would certainly not be based on constitutionally entrenched measures. If it was found that the LRA supports this move, it could be criticised in turn for facilitating the employer's inability to respect the employee's constitutional rights affected in the course of the criminal misconduct investigation and therefore disciplinary hearing. Such a criticism would influence the need for investigative and disciplinary hearing processes to align with the constitutional imperatives to fairness inferred in section 23(1) read with sections 8 (2), (3); 9,33,35 and 39(2) of the Constitution. This would therefore mean, that employer's powers in investigating criminal misconducts against an employee observe the constitutional rights of employee suspects pertaining to employees suspected of criminal misconduct. It would also mean that the means employed by the employer in satisfying the LRA objective of fairness when disciplining employees suspected of criminal misconducts would not need to ignore entrenched constitutional rights of employees suspected of crime. Employers would observe that a need to establish a reason for dismissal where employees are suspected of criminal misconduct in labour law ought not supersede other constitutional rights. The principle of flexibility ought to have a narrow application and in cases where employees are suspected of criminal misconducts, employers should not exercise unfettered discretion.

Paul Marciano's model vouches respect garnered by employer's inspiration and influence on employees.⁶³² According to Marciano's philosophy

⁶³² Read Read Marciano above note 542 at 63 and Marciano P L& Wingrove C *Super Teams: Using the Principles of RESPECT* 18 and 39.

employers are ought to engage employees towards attaining institutional objectives.⁶³³ Marciano suggests that through such employee engagements a new perspective of discipline would be born. It is submitted that Marciano's perspective, influences employers to raise the status of employees from the common law labour law perspectives of master and servant. Employees would be treated as individuals clothed with constitutional rights. Under this model, employees are not just tools of performance but are valued and respected. Through respecting employees, employers recognise, acknowledge and show appreciation for employees' efforts and contributions. Employers who tell their employees that they appreciate their work, obviate this through improved performance. Such employers will from time to time give credit to employees where it is due. They will reward employees' good job performance regularly.

In order to attain institutional objectives employers would undertake **to empower** employees.⁶³⁴ They will provide employees with tools for performance including, training, resources, opportunities and information to be successful.⁶³⁵ The provision of information and direction would be necessary for employees to succeed in the implementation of assigned tasks.⁶³⁶ Employers would actively promote development opportunities for the employees. Employees would have a sense of independence, as the top down oriented disciplinary measures would be minimised. Employers would know what is expected of them and know how to go about their task and would have the necessary tools, resources and skills to succeed.

In the aim to attaining institutional objectives, employers would also undertake to **give supportive** feedback to employees.⁶³⁷ Supportive

⁶³³ Read Marciano above note 542 at 63 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5 and 41.

⁶³⁴ Read Marciano above note 542 at 131-163 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5 and 41.

⁶³⁵ Read Marciano above note 542 at 131-163 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 50 and 97.

⁶³⁶ Read Marciano above note 542 at 131-163 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 50 and 97.

⁶³⁷ Read Marciano above note 542 at 115-130 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 62-74.

feedback entails employer's regular provision of constructive performance feedback where not only negative behavior is overemphasized but positive performance is indicated.⁶³⁸ The employer would vouch at assisting employees who are struggling with their performance.⁶³⁹

Marciano's respective model also encourages the attainment of institutional objectives through efforts towards employer and employee partnering.⁶⁴⁰ Partnering encourages collaborative working relationships at the individual, team and organizational levels.⁶⁴¹ It promotes teamwork while encouraging employers to actively reach out and collaborate with employees.⁶⁴² Partnering breaks down compartmentalized and segregated discipline.⁶⁴³ It encourages cross-departmental cooperation, where employers and employees from different departments within an institution negotiate and compromise to meet institutional objectives.⁶⁴⁴

Under this model, employers are expected to be actively involved in employee orientation on what is expected of them and on what support they can expect from the institution.⁶⁴⁵ The informed employees would then be accountable for their actions and inactions.⁶⁴⁶ They would know where to draw their mandate in order to achieve institutional goals and objectives because the employer would have set clear and consistent direction

⁶³⁸ Read Marciano above note 542 at 115-130 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 50-74.

⁶³⁹ Read Marciano above note 542 at 115-130 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 50-74.

⁶⁴⁰ Read Marciano above note 542 at 131-143 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 75-87.

⁶⁴¹ Read Marciano above note 542 at 131-143 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 75-87.

⁶⁴² Read Marciano above note 542 at 131-143 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 75-87.

⁶⁴³ Read Marciano above note 542 at 131-143 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 75-87.

⁶⁴⁴ Read Marciano above note 542 at 131-143 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 75-87.

⁶⁴⁵ Read Marciano above note 542 at 39-63 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 75-87.

⁶⁴⁶ Read Marciano above note 542 at 39-63 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 108-116.

regarding work priorities.⁶⁴⁷ The employer would also orientate employees on reasonable standards applicable in working environment.⁶⁴⁸ The employer would from time to time and with clarity communicate goals and objectives of the institution.⁶⁴⁹

The employer is duty bound, to be considerate when taking decisions that affect the employees.⁶⁵⁰ The set institutional standards would reflect rules that took into account the interests of all concerned parties.⁶⁵¹ Thus, rules that are inconsiderate of the impact on the rights of employees would be avoided.⁶⁵² In making and implementing the governing rules, the impact of such rules on all stakeholders would be integral to the ultimate results.⁶⁵³ In all instances, the employer would solicit ideas and concerns of the employees.⁶⁵⁴

Very close to the idea of actively involving the employee in decision-making, is the employer's characteristic of trust towards the employee.⁶⁵⁵ The employer has to demonstrate that employees are trusted.⁶⁵⁶ In turn, this characteristic would promote employees who have trust in the institutional aims and objectives as well as trusting each other.⁶⁵⁷ Employees' decisions

⁶⁴⁷ Read Marciano above note 542 at 39-63 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 148-155.

⁶⁴⁸ Read Marciano above note 542 at 39-63 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 148-155.

⁶⁴⁹ Read Marciano above note 542 at 39-63 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 148-155.

⁶⁵⁰ Read Marciano above note 542 at 163-180 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 18-23 and 97-107.

⁶⁵¹ Read Marciano above note 542 at 163-180 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 18-23 and 97-107.

⁶⁵² Read Marciano above note 542 at 163-180 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 18-23 and 97-107.

⁶⁵³ Read Marciano above note 542 at 163-180 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 18-23 and 97-107.

⁶⁵⁴ Read Marciano above note 542 at 163-180 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 62-74.

⁶⁵⁵ Read Marciano above note 542 at 163-180 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 108-116.

⁶⁵⁶ Read Marciano above note 542 at 163-180 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 108-116.

⁶⁵⁷ Read Marciano above note 542 at 163-180 and 181-200 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 108-116.

would be trusted by the employer and vice versa.⁶⁵⁸ This aspect enhances integrity among employees where employees would be trusted to deal directly with sensitive information.⁶⁵⁹

The employer would lead by example, simply by being direct with employees where the need arises instead of harboring grudges against employees.⁶⁶⁰ Employers would be committed and consistently keep to promises agreed upon between the employer and the employees.⁶⁶¹ Failure by the employer to honor these aspects, would demonstrate that the employer does not respect the employees.⁶⁶² In turn, the employer would endure disrespect from employees.⁶⁶³ The importance of respect for employees in a work environment cannot be overrated.⁶⁶⁴ Respect is a crosscutting characteristic for transformational leadership envisaged in Marciano's model of discipline.⁶⁶⁵ According to this model, it is important that employers demonstrate respect for employees.⁶⁶⁶ This is reflected where the employees' opinions are accounted for in decision-making.⁶⁶⁷ In turn, the employees would enjoy a treatment that is fair and dignified.⁶⁶⁸

⁶⁵⁸ Read Marciano above note 542 at 163-180 and 181-200 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 108-116.

⁶⁵⁹ Read Marciano above note 542 at 163-180 and 181-200 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 108-116.

⁶⁶⁰ Read Marciano above note 542 at 163-180; 181-200; 39-83 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 132-147.

⁶⁶¹ Read Marciano above note 542 at 181-200 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 132-147.

⁶⁶² Read Marciano above note 542 at 181-200; 201-208; 68-69;78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 39-61.

⁶⁶³ Read Marciano above note 542 at 181-200; 201-208; 68-69;78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 39-61.

⁶⁶⁴ Read Marciano above note 542 at 181-200; 201-208; 68-69;78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 39-61.

⁶⁶⁵ Read Marciano above note 542 at 181-200; 201-208; 68-69;78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 39-61.

⁶⁶⁶ Read Marciano above note 542 at 181-200; 201-208; 68-69;78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 39-61.

⁶⁶⁷ Read Marciano above note 542 at 181-200; 201-208; 68-69;78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 39-61.

⁶⁶⁸ Read Marciano above note 542 at 181-200; 201-208; 68-69;78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 39-61.

These aspects would breed fair and honest processes in the interactions between employers and employees even in compromising situations.⁶⁶⁹ For instance, where an employer wishes to exercise discretion on matters entailing the disadvantage of the employee, the fact that the norm is to respect an employee would inform the ensued discretion. In the case where an individual is suspected of a criminal misconduct, the respect of an employee would demand that the employee is not judged at his own course.

The employer's flexible exercise of discretion regarding principles, to choose in avoidance of the rigid legal rules would not cost the employer disrespect on the part of employee suspected of criminal misconduct. Before the employer concludes that the employee is a criminal, and therefore worthy of dismissal, the employer who has been acculturated,⁶⁷⁰ from Marciano's perspective of discipline, to respect his employees would realise the repercussions of criminal labelling of an individual and would choose to consider principles entailing fair criminal persecution.

These principles are entrenched in section 35 of the Constitution. At the center of section 35 principles is, that a criminal suspect must be treated fairly. The interpretation of section 35 relates the perspectives of fairness from a criminal persecution perspective. As opposed to the way the LRA relates fairness, namely that only the *audi alterum* principle matters, the criminal persecution perspective takes cognizance of both principles of natural justice, namely, the ruler ought to hear both sides and ought to not punish the aggrieved at their own cause. These principles are extrapolated in chapters three and four. Their synopsis is that a criminal

⁶⁶⁹ Read Marciano above note 542 at 181-200; 201-208; 68-69;78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 39-61.

⁶⁷⁰ Consider suggestions against old models of discipline for adoption of new models. Read Fielkow above note 544. Also read Marciano above note 542 at 181-200; 201-208; 68-69;78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 39-61. as well as Zack A & Bloch R *The arbitration of discipline cases* 84. Also refer to Asherman IG 1982 *Personnel Journal* 528 -531at 528. The principle of acculturation is extrapolated in Seidman R B *The State, Law and Development* 105.

suspect must be heard, however in that course a criminal suspect should not be driven to make up a case against itself.⁶⁷¹

2 3 Conclusion

This chapter has managed to unpack the rationale behind the South African labour law fairness as it applies to employer disciplinary powers over employees who are suspected of having committed criminal acts. It has shown that employee criminal misconducts are a species of matters of criminal law nature. The chapter has expounded on the flexibility and proportionality as theories founding approaches underlying the dismissal of employees suspected of criminal misconducts. It proved that although proportionality related principles are constitutionally entrenched principles for dealing with matters of criminal law nature, they are not consistently invoked by the employer investigation and dismissal processes for dismissal of employees suspected of criminal misconduct. These processes are predominantly reliant on flexibility.

In this chapter, the rationale for South African constitutional fairness in matters of criminal law nature was expressed through interpreting proportionality-based principles. The chapter exposed that flexibility and proportionality are philosophies that underlie fairness expressed in the application of sections 23; 33 and 35 of the Constitution. It has shown the rationality of South African Constitution fairness principle. It has explained how constitutional fairness ought to apply in matters of criminal law nature within which criminal misconducts are classified.

It found that the philosophical understanding underpinning work environment discipline, namely flexibility does not accommodate

⁶⁷¹ This is a major principle in criminal punishment procedure where the standard of proof is that the persecutor must prove its case beyond a reasonable doubt. That is why in situations where there is no evidence against an accused, the accused cannot be compelled to open its mouth and make out a case against itself. The gathering of evidence against the suspect is also supposed to follow the prescribed procedure and not be as willy-nilly and as uncontrolled as the gathering of evidence within the prescripts of flexibility allowed in labour law.

constitutional fairness principles intended to be applied on matters of criminal law nature.

The chapter established the evolution of employer disciplinary processes in South African common law era and constitutional law era. The common law era of the Industrial Court was found to have accommodated proportionality-based measures similar to those now expressed in section 35 of the Constitution read with the CPA.

The chapter revealed that the constitutional era has procedural disparities between the treatment of employees suspected of criminal misconducts and that of ordinary criminal suspects. In the current time employers treat employee criminal suspects differently from the common law era by ignoring the application of section 35 entrenched fair trial principles. The employer investigation and dismissal processes seek to rely only on fairness principles entrenched in section 23 read with section 33 while dealing with dismissals based on criminal misconducts. Thus, dismissal processes based on criminal misconducts discloses ensuing clash between fair procedural rights in matters of criminal law nature and labour law fairness procedure for employee criminal suspects. This becomes apparent in the employers' relentless procedural pursuit of one objective of condemning criminal behaviour of employee criminal suspect. In this chapter it was shown that the investigation and disciplinary processes against the employee who is suspected of having committed a criminal act, although not aimed at determining the ultimate guilt of the suspect, are closely linked to subsequent criminal trial proceedings and therefore have a potential of successive impact on the employee criminal suspect's rights.

Even though criminal persecution is embedded in strict foundations of criminal condemnations, it was found in this chapter, that employer criminal persecutions underrate these foundations.

It was observed that this otherwise approach is in effect constitutionally unfair. It was also observed that it is unfair from a criminal justice

perspective to negate principles of natural justice,⁶⁷² like employer criminal investigations and dismissal hearings seek to do. Criminal justice was found to be centred on proportionality negated by the employer in dealing with matters of a criminal law nature. It was observed that natural justice principles based on proportionality were negated to sustain progressive discipline approach in labour law.

Progressive discipline adopted in employee criminal persecution has been criticised as purposely selective of the principles of punishment mandatory for the needed balance in criminal condemnation. The interpretation of progressive discipline exposed it as lacking the details outlined in Marciano's perspective of discipline.⁶⁷³ Marciano approach advocating for discipline that considers individual interest,⁶⁷⁴ was seen to be proportionate with South African constitutional fairness justification based on human rights grounded culture.

The perspective maintaining employer flexibility was read to suggest that, the employer as the master, deserves to satisfy only its interest at the expense of employee suspect's rights. This perspective was seen to be outrightly anti-constitutional fairness perspective on individual rights.

The grip on the foundations of master and servant relationship in South African labour relations could not be underestimated. The inclination to flexibility and negation of proportionality in the current labour law jurisprudence revealed that master and servant prescripts are still pervasive in current labour law systems. This is so even though the master and servant relationship were the nerve of revolution in South African labour relations. This inclination at least as far as employer criminal investigations

⁶⁷² That the ruler ought to hear both sides and ought to not punish the aggrieved at their own cause.

⁶⁷³ In para 2 2 2 on the traditional approach or progressive approach

⁶⁷⁴ Fielkow Brian Why its Time to Kill Progressive Discipline 12/06/2018 <https://chiefexecutive.net/why-its-time-to-kill-progressive-discipline> [accessed 21 07 18]. Also read Marciano above note 542 at 181-200; 201-208; 68-69; 78-79 and Marciano P L & Wingrove C *Super Teams: Using the Principles of RESPECT* 5-17 and 39-61 as well as Zack A & Bloch R *The arbitration of discipline cases* 84. Also refer to Asherman IG 1982 *Personnel Journal* 528 -531 at 528

and discipline are concerned cannot stand water in South African constitutional and ILO perspectives of justification provided in Article 4 of *Termination of Employment convention, No. 158 of 1982*.⁶⁷⁵ Every law in South Africa has to be constitutional fairness inclined and therefore observe constitutional fairness within its wide constitutional perspective.

The labour law principle of flexibility segregating the full application of natural justice risks letting employers' compromise of essential principles of criminal condemnation. Within the employer's flexibility to choose as to whether the employee's criminal act could be offensive to the extent that it renders the employer-employee relationship disintegrated, lies the opportunity to create other species of unlegislated creatures of crime.

As shown above, the employer, for example, is not bound to follow proper principles of criminal investigation and presentation of evidence, although the employer would be dealing with criminal misconducts. As early as the investigation stage, the employer can lead the employee to self-incrimination at the disguise that the employee is being allowed opportunity to be heard in terms of Item 4 of the Code.

Looked at from the obverse side, the employee's right to be heard without recognition of employee's right against self-incrimination bears no guarantee that the employer would appreciate employee's right against self-incrimination.⁶⁷⁶ In accordance with section 35 of the Constitution, the right against self-incrimination underlies every aspect of criminal persecution from investigation up to the hearing stage.

Based on the expounded theories of flexibility and proportionality in this chapter, the next chapter evaluates the principle of fairness as applied by

⁶⁷⁵ Per Article 4(b) of the Termination of Employment Convention, No. 158 of 1982. As well see Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment

https://www.ilo.org/wcmsp5/groups/public/ed_norm/-normes/documents/meetingdocument/wcms_100768.pdf [accessed on the 12 Jan 2019]

⁶⁷⁶ The situation in the current labour law is that employees' right against self-incrimination is considered a triviality, see Grogan J *Dismissal* (2018) 213.

employers aiming at disciplining employees who committed criminal misconducts.

Chapter Three

Fairness in employer criminal investigations and disciplinary hearings in the light of fairness in criminal justice

3 Introduction

The previous chapter confirmed that in proceedings against matters of a criminal law nature couched within either civil or criminal justice systems, some measure of fairness is observed. Chapter two, further, exposed the extent to which this observance differs between civil proceedings in labour law and criminal proceedings under the criminal justice system; providing the underlying theoretical causes of such discrepancies. The variations were linked to the underlying progressive discipline theory of labour law adopted in South African labour law which negates some fundamental measures of proportionality principles to accommodate flexibility.

This chapter investigates the South African jurisprudential expression of the nature of labour law fairness and compares it to the nature of entrenched constitutional fairness principles dealing with matters of a criminal law nature.

In anticipation, a study of fairness processes in South African labour law viewed in the light of proportionality and flexibility theories extrapolated in chapter two is eminent. The chapter shows that while processes of fairness that are established ⁶⁷⁷ in dealing with matters of a criminal law nature largely rely on the theory of proportionality, from the labour law disciplinary perspective for matters of a criminal misconduct, processes of fairness greatly lean towards the theory of flexibility.

⁶⁷⁷ Found in the CPA and section 35 of the Constitution.

3 1 The nature of the right to fair dismissal on the basis of a criminal misconduct.

The determination as to whether an employee has been afforded a fair dismissal depends on whether the employer followed requirements in item 4 of LRA Schedule 8 code of good practice: Dismissal. It is item 4(1) and (3) of the code that gives guidelines on how the employer may carry out discretion to dismiss an employee suspected of criminal misconduct. The LRA⁶⁷⁸ draws a distinction between the procedure for the dismissal and the reason for a dismissal⁶⁷⁹. In terms of section 188 of the LRA, the employer has to establish that the decision to dismiss an employee was based on fair procedure and that it was substantively fair⁶⁸⁰ to dismiss an employee.

The manner of the dismissal or the right to a fair procedure remains, in our law, a crucial component in the determination of a fair decision. Even though the LRA does not define the concept of substantive fairness, it does refer to the Code of Good Practice: Dismissal (the Code) as a guide in respect of such issues. An enquiry into the substantive fairness of a dismissal is in fact an enquiry as to whether there is a valid and fair reason for the dismissal. The facts of a particular case, and the appropriateness of dismissal as a sanction in the context of such facts, constitute the basis upon which a determination as to whether a fair reason exists must be made.

Jurisprudentially, substantive fairness in labour law is equated to constitutional administrative fairness.⁶⁸¹

According to Monyakane, constitutional administrative fairness embraces both natural justice principles of fairness.⁶⁸² Monyakane gleans the essence

⁶⁷⁸ Section 188 of the LRA.

⁶⁷⁹This is a reference to section 188 of the LRA which draws a distinction between a 'fair reason' and a 'fair procedure.'

⁶⁸⁰ In accordance with the internal rules; policy read together with LRA. To identify what constitutes essential questions in misconduct cases, read page 213 of Grogan J *Dismissal* (2018) 213. Also see Ncgobo J in *Sidumo* above note 180 paras 80-141.

⁶⁸¹Brassey *Employment and Labour Law* at A7-1 - A7-2; Currie I & De Waal J *The Bill of Rights Handbook* at 651, fn 34; *Sidumo* above note 180 paras 78-79.

⁶⁸²Monyakane above note 9 at page 11.

of constitutional administrative fairness from reading section 33 of the Constitution together with the Preamble, sections 1 and 195 of the Constitution.⁶⁸³ Monyakane further explains the objective of constitutional administrative fairness in the promotion and the protection of individual rights through urging accountability in the exercise of public power. Accordingly, every exercise of constitutional fairness should refrain from actions that might jeopardise constitutional individual rights.⁶⁸⁴ Such exercise of authority must realise lawfulness, reasonableness and fairness. In *Sidumo*,⁶⁸⁵ the Constitutional Court pronounced, *inter alia*, that commissioners acting under the auspices of the CCMA exercise a public power and that when they conduct arbitration proceedings, they are in fact performing administrative functions. Within these functions falls the CCMA's duty to review substantive fairness in employer dismissals based on employee criminal misconducts.⁶⁸⁶ Thus the CCMA awards on whether employers observed substantive fairness constitute administrative action within the meaning of section 33, which establishes the individual right to lawful, reasonable and procedurally fair administrative action (the right to just administrative action).⁶⁸⁷

Section 33 of the PAJA established right *sui generis*. In recognition of this special right, Monyakane⁶⁸⁸ refers to it as the right to administrative justice as a human right (RAJAH). In her study on the foundation to this right, she finds the position of section 33 within the wide constitutional transformative principles and the rule of law. She then sees interlinks between the preamble, sections 1, 33 and 195 of the Constitution. In analysing their interrelationship, she finds the purpose of PAJA in encompassing

⁶⁸³ Monyakane above note 9 at page 11.

⁶⁸⁴ In support of this view consider Mureinik E 1994 *SAJHR* 31, 32; Klare K 1998 *SAJHR* 1998 146; Burns Y 2002 *SAPL* 283; *Shabalala v Attorney-General, Transvaal* 1995 12 BCLR 1593 (CC); *Fose v Minister of safety and Security* 1997 7 BCLR 851 (CC) & 1997 3 SA 786 (CC) para 98 and 99; Monyakane above note 9 at pages 2 and 11.

⁶⁸⁵ *Sidumo* above note 180 para 139.

⁶⁸⁶ *Sidumo* above note 180 para 139.

⁶⁸⁷ *Sidumo* above note 180 para 139.

⁶⁸⁸ Monyakane above note 9 at pages 2 and 11.

transformative principles entrenched in the Preamble, sections 1, 33 and 195 of the Constitution. She observes that section 33 gives effect to the right to lawful, reasonable and fair decisions provided for in section 33(1) and (2) of the Constitution and thus calls for efficiency and accountability in the performance of administrative functions.

Taking this further, Monyakane⁶⁸⁹ argues that through facilitating administrative review, PAJA gives individuals the ability to challenge the justiciability of decisions by authorities before the courts of law. She then concludes that PAJA is the umbrella statute for all legislation dealing with administrative issues and serves as an expression of the constitutional right to administrative justice as a human right, which outlines how every administrator should do their duty in the constitutional dispensation.

The labour law jurisprudential interpretation of the LRA supports the view that section 145 of the LRA categorises legislation in consonance with the PAJA review standards umbrella.⁶⁹⁰

Through *Carephone (Pty) Ltd v Marcus NO and others* (hereinafter *Carephone*)⁶⁹¹ the Labour Appeal Court maintains that even though section 145 of the LRA was enacted within the previous constitutional standard for the justification of the outcomes of administrative decisions only, through reasons provided in the case, section 145 of the LRA now is reflective of the constitutional standard of reasonableness within section 33 prescripts.⁶⁹² Applying the latter standard affects not only the constitutional right to fair labour practices, but the right to lawful, reasonable and procedurally fair administrative action.⁶⁹³ In addition, section 145 was to some extent held to enable a section 33-compliant interpretation of fairness.⁶⁹⁴

⁶⁸⁹ Monyakane above note 9 at pages 2 and 11.

⁶⁹⁰ *Sidumo* above note 180 paras 138.

⁶⁹¹ *Carephone (Pty) Ltd v Marcus NO and others* 1998 11 BLLR 1093 (LAC) paras [17]-[19] and paras [25]-[38].

⁶⁹² Entrenched in section 33 of the Constitution.

⁶⁹³ *Carephone (Pty) Ltd v Marcus NO and others* 1998 11 BLLR 1093 (LAC) paras [17]-[19] and paras [25]-[38].

⁶⁹⁴ *Sidumo* above note 180 paras 139-141.

As explained earlier, section 33 is one of the fundamental provisions that give substance and effect to the constitutional values of accountability, responsiveness and openness entrenched in section 1(d) of the Constitution and section 195(1) of the Constitution. These qualities were also held to be the essentials of labour law fairness qualities.⁶⁹⁵

It is therefore submitted that the provisions of the Constitution are a backbone to the labour law review process. As such, the constitutional provisions ought to be the starting point in attempts that seek to ascertain the parameters for standard review of fairness.⁶⁹⁶ Section 2 of the Constitution describes the Constitution as the supreme law of the Republic; bearing the principle that any legislation inconsistent with the Constitution is invalid. Section 195 (3) of the Constitution insists that national legislation must ensure the promotion of the values and principles in section 195(1) of the Constitution. This obligation is imposed on both private and public law and must be fulfilled. In addition, section 39 (2) of the Constitution commands every decision maker to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.

Within the employment scope, the legislation referred to in sections 2 and 39(2) of the Constitution is the LRA. It is this law that regulates the judicial review of fairness as in the CCMA arbitration awards, where substantive fairness regarding employer dismissals based on employee criminal misconducts is determined. The LRA does recognise the supremacy of the Constitution. The interpretative injunction in section 3(b) of the LRA provides that any person applying the provisions of the LRA must interpret such in compliance with the Constitution. Furthermore, the finding in

⁶⁹⁵ *Sidumo above note 180* paras 137-141.

⁶⁹⁶ Of the same notion are cases of *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 4 SA 877 (CC); 1995 10 BCLR 1289 (CC); at para. 62; *Hugo v President of the Republic of South Africa and Others* 1997 4 SA 1 (CC); 1996 6 BCLR 876 at paras. 11 and 28.

*Sidumo*⁶⁹⁷ that commissioners of the CCMA exercise a public power denotes that the CCMA is an organ of the State.⁶⁹⁸

On this basis, it is trite to argue that as it is expected in exercising public power, the CCMA, being an organ of State that exercises public power, invites the application of the provisions of section 195 of the Constitution to its commissioners when they conduct arbitration proceedings under the LRA.

According to Monyakane,⁶⁹⁹ section 195 outlines the basic values and principles governing public administration. It can therefore be argued that section 195 values which in effect re-live section 33 principles are ought to be observed by employers to meet substantive fairness in dismissals of employees who committed criminal misconducts.

Writing from an administrative law perspective, Monyakane⁷⁰⁰ explicates how the stipulations of section 33 relate to section 195 of the Constitution in the formulation of 'the right to administrative justice as a human right'. Section 33 of the Bill of Rights in the Constitution provides for the limitation of administrative power. It mitigates against possible negative effects, such as decisions that may have been taken in haste, based on ill conception or eccentric idiosyncrasies that are contrary to constitutional demands. In conjunction with this is section 195 of the Constitution, which provides that public administration be governed not only by democratic values,⁷⁰¹ but also by the following principles enshrined in the Constitution: encouragement of broadly representative public participation in policy-making, equitable and unbiased provision of services, accessible and accurate information and the maximization of human potential.⁷⁰²

The provisions of section 33 and its mitigating effect guarantee different elements of the right to administrative justice. In particular, they set out

⁶⁹⁷ *Sidumo* above note 180 paras 137-141.

⁶⁹⁸ *Sidumo* above note 180 paras 139.

⁶⁹⁹ Monyakane above note 9 at page 2 and 11.

⁷⁰⁰ Monyakane above note 9 at page 2 and 11.

⁷⁰¹ The Preamble, section 1 and Section 33.

⁷⁰² Monyakane above note 9 at page 2 and 11.

specific rights to safeguard justifiable administrative action, namely, that administrative action should be fair, lawful and reasonable. The section therefore establishes a 'general duty to act fairly,' where individual rights are effected in accordance with the rule of law as spelled out in the Constitution.⁷⁰³ Through its provisions, section 195 contemplates a transformed public service within the broader context of transformation as envisaged in the Constitution. In this way, the new constitutional dispensation reverses the unreasonable decision-making which hitherto influenced the behaviour of administrators empowered to make decisions in the manner that the employers do.

It is appropriate to note the observation by Monyakane⁷⁰⁴ that under the common law era administrative power was abused and hence was characteristically unreasonable without observing current constitutional checks.⁷⁰⁵ A similar argument is possible in the scenario of employer criminal investigations and subsequent dismissals on the basis of criminal misconduct where the essentials of fairness in matters of criminal law nature is underrated with flexibility-based principles as opposed to proportionality mandatory in meting out criminal justice. It would not be possible to measure reasonableness in terms anticipated in administrative justice rationales from the employer's flexible criminal investigation discretions and dismissals; for, if anything, most of the anticipated rules and principles⁷⁰⁶ would have been overlooked.

The purpose behind the South African formulation of the "right to administrative justice as a human right" is two-fold. It promotes public participation in public governance and ensures everyone a right to lawful, reasonable and procedurally fair administrative action.⁷⁰⁷ Besides ensuring

⁷⁰³ Du Plessis and Corder H *Understanding South Africa's Transitional Bill of Rights* 169.

⁷⁰⁴ Monyakane above note 9 at pages 2 and 11.

⁷⁰⁵ Monyakane above note 9 at pages 2 and 11.

⁷⁰⁶ Entrenched in section 35 read with the CPA.

⁷⁰⁷ Monyakane above note 9 at pages 2 and 11 *Pharmaceutical Manufacture Association of South Africa in re: the Ex parte Application of the Republic of South Africa*

that public administration complies with the constitutional demands to curb possible maladministration, the right to administrative justice as a human right allows every person to challenge the unreasonable exercise of power action before the courts of law.⁷⁰⁸ It mainly affords affected persons *loci standi in judicio*.⁷⁰⁹ It therefore remedies the restrictive common law procedures. By reducing these obstacles, the Constitution unleashes individual potential to realise self-determination.

In employer criminal investigation and dismissal processes, a similar scenario to common law is experienced by the employees. Employees are facing employer discretionary and flexible procedures. These procedures are not controlled by the law as they are just in a code, not legislation. Employees are not able to challenge the employer discretion because they do not have such liberty to self-determination. They are left without an alternative. They are unable to challenge the employer's unreasonable decision to condemn them without following available constitutional provisions in section 35 of the Constitution. Employer criminal investigatory procedures and disciplinary hearing processes are purely discretionary and pays no regards to section 35 of the Constitution. Through exercising criminal investigatory discretions, the employer is not bound by criminal justice prescripts⁷¹⁰ even though dealing with matters of criminal law nature.⁷¹¹

The employer's actions, which in effect deny employee criminal suspects of their constitutional rights as criminal suspects, are also contrary to the enforcement of the right to administrative justice effecting the right of access

2000 2 SA 674 (CC) 696 C-D; Devenish et al. *Administrative Law* 4; Brigid H *Judicial Review a Thematic Approach* 3.

⁷⁰⁸ *Pharmaceutical Manufacture Association of South Africa in re: the Exparte Application of the Republic of South Africa* 2000 2 SA 674 (CC) 696 C-D; Devenish et al. *Administrative Law* 4; Brigid H *Judicial Review a Thematic Approach* 3.

⁷⁰⁹ The right of standing before court or tribunal.

⁷¹⁰ Per section 35 of the Constitution read with the CPA.

⁷¹¹ See Grogan J *Dismissal* (2018) 213 who clearly explains that employee criminal suspects cannot claim certain rights encompassed in the right against self-incrimination. The right against self-incrimination is part of section 35 rights.

to court.⁷¹² Access to courts is a necessary and implicit right in the protection of other more substantive rights like the right against self-incrimination.⁷¹³ In facilitating the right to access to courts in administrative matters, the right to administrative justice as a human right can be termed a 'collateral right'.⁷¹⁴ Therefore it is a right that guarantees that individuals may challenge administrative action before the courts of law.⁷¹⁵ According to Monyakane,⁷¹⁶ the right to challenge administrative action,

...means that if the law or conduct of the state violates the Bill of Rights, an affected person can approach the courts⁷¹⁷ to examine whether subordinate legislation or administrative conduct conforms to the Constitution and gives appropriate relief to the affected. The Constitution therefore provides for a drastic change in the position of administrative law.⁷¹⁸

In the light of the fact that employer criminal investigations are discretionary and based on flexibility principles, employers are able to quash employee criminal suspects' rights from the valuable initial stages of the criminal charges.⁷¹⁹ The employee criminal suspects who do not have much room to exercise their anticipated rights as criminal suspects

⁷¹² Entrenched in section 34 of the Constitution.

⁷¹³ This concerns the subjective claims of individuals vis-à-vis authority as opposed to procedural rights which denote a set of legal rules which lay down basic standards of conduct to be observed by authorities in the course of the administration of justice.

⁷¹⁴ In describing the conceptual nature of rights of access in public law, Suskin *The Problematical State of Access* 3 writes,

access rights may take one of two forms, or be a combination of the two forms. They may be either collateral rights or autonomous rights. The term collateral refers to the right of access as a necessary and implicit element in the protection of other more substantive rights. An autonomous right of access is a free standing right existing irrespective of the specific nature of the substantive claims being made.

⁷¹⁵ *Pharmaceutical Manufacture Association of South Africa in re: the Exparte Application of the Republic of South Africa* 2000 2 SA 674 (CC) 45; Devenish et al. *Administrative Law* 4; Currie I & De Waal J (eds) *Administrative Law* 318-319.

⁷¹⁶ Monyakane above note 9 at pages 49-52.

⁷¹⁷ Currie I & De Waal J (eds) *Administrative Law* 318-319.

⁷¹⁸ Monyakane above note 9 at pages 49-52.

⁷¹⁹ See Grogan J *Dismissal* (2018) 213 who clearly explains that employee criminal suspects cannot claim certain rights encompassed in the right against self-incrimination. The right against self-incrimination is part of section 35 rights.

are deprived from the collateral rights to administrative justice, including the right of access to court until the employer has certified them criminals and dismissed them.

Employer discretion to dismiss employees who are alleged to have committed criminal acts falls within the four corners of the LRA,⁷²⁰ employer rules and policies.⁷²¹ Even if employer processes have a negative impact on the rights of employee criminal suspects, they are still reviewed within the employer rules, policies and laws without regard to these rights.

In cases where employer criminal investigations do not observe the principle that 'a man be judged not at his own cause', employee criminal suspects, risk subjection to self-incrimination⁷²² and consequently double punishment.⁷²³ As a result, the arbitration service of the CCMA should require a broader perspective of review which takes into account these rights at stake and the fairness principles entrenched in section 35 of the Constitution. Additional questions pertaining to the justiciability of employer's exercise of discretion must be answered as well. This is even more necessary in the case where the review of decisions under section 33 of the Constitution put in operation by PAJA is operationalized.

In the framework of the judicial review of CCMA arbitration awards on whether the employer has established substantive fairness, section 195 would require that compulsory arbitration service of the CCMA be provided impartially, fairly, equitably and without bias. It ought to give constitutional expression instead of the "narrow" LRA substantive fairness taking into regard that section 145 of the LRA is subsumed into justiciability prescripts in section 33 of the Constitution.⁷²⁴ This move ought to do away with

⁷²⁰ *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 3 SA 1 (CC); 2003 2 BCLR 154 (CC) (*NEHAWU*) Para 33; *Sidumo* above note 180 paras 80-141.

⁷²¹ Grogan J *Dismissal* (2018) 213.

⁷²² Grogan J *Dismissal* (2018) 213.

⁷²³ In most cases after dismissals based on criminal misconducts, employee criminal suspects are subjected to criminal prosecutions. See cases discussed in chapter four at para 4 3 1 on the parallel nature of criminal misconducts dismissal processes.

⁷²⁴ Narrow in the sense that it aims at catering for employer flexibility and therefore observes only one leg of the principles of natural justice. *The audi alterum partem rule*.

unreasonable CCMA reviews on substantive fairness is apparent in matters entailing dismissals on the basis of criminal misconducts. Section 195 read with section 23, section 33 and section 35 would further require mechanisms to be in place to hold CCMA accountable for the manner in which it conducts arbitration proceedings. These concerns would trickle down to questioning the extent of the employer's exercise of power in investigations that culminate in dismissals based on employee criminal misconducts.

In terms of these provisions,⁷²⁵ the CCMA would exercise a wide review of employer's discretion to establish rationality and the constitutional justiciability of the employer's criminal investigations. In the best interests of promoting transparency, arbitration awards would be accessible, given timeously and accurately to the parties of these proceedings.⁷²⁶ Lastly, but of essential importance: the arbitration process within section 195 values would require sufficient and effective results. The employee would not find himself faced with parallel proceedings and giving evidence that incriminates him.⁷²⁷ Thus, the CCMA would be tasked with ridding off peripherals of arbitrariness that happened when the employer made internal decisions to investigate the employee criminal suspect within uncontrolled means and decide to dismiss the employee who is condemned and stigmatised a criminal without following principles constitutionally entrenched for condemning criminals.⁷²⁸

It would be at this stage that the substance of employer criminal investigations and dismissals would be subjected to an examination against tenets of substantive fairness as understood from a criminal justice fairness perspective. The CCMA would embark on a constitutional review to remedy

⁷²⁵ Section 195 read with section 23; section 33 and section 35.

⁷²⁶ For example, currently the employee suspected of a criminal misconduct cannot access CCMA review regarding employer's ignorance of employee rights against self-incrimination.

⁷²⁷ The right against self-incrimination is the central right in section 35 of the constitution. It is the central right in section 35 fairness principles.

⁷²⁸ The CCMA would insist that employers' discretion be exercised with caution not to jeopardise other constitutional rights.

internal decisions' lack of observance of constitutional demands, including the criminal suspects' rights. Its review ought to extend to procedural propriety and substantive reasonableness. It would dissect the rationale of employer decisions as opposed to merely interpreting legislation, internal rules and policies to find the employer intentions.⁷²⁹ It is at this stage that the broader constitutional substantive fairness perspective on employee criminal proceedings would be realised.

In pursuit of these constitutional duties against the CCMA, two further fundamental rights explicitly contemplated in sections 23 and 34 of the Constitution come into play if one considers the constitutional impact on the Labour Court's supervisory functions in respect of CCMA arbitration awards. In *Sidumo*,⁷³⁰ the Constitutional Court held that in this context the right to fair labour practices that protect workers' right to employment security is consistent with the right to just administrative action. It can be argued that, in part by entrenching this right, the Constitution advocated for a *flexcurity*⁷³¹ approach.⁷³² By doing so, it seeks to maintain a balance between employer flexibility in the employment arena and other social rights, which from a South African constitutional human rights-based culture, are constitutional rights.

In a related context, Alena Nešporová, Sandrine Cazes,⁷³³ referring to Auer, Berg and Coulibaly⁷³⁴ explain this approach from an international law perspective, as an approach that rearranges employment protection

⁷²⁹ Grogan J *Dismissal* (2018) 213.

⁷³⁰ *Sidumo* above note 180 para 139.

⁷³¹ A concept adopted from The Commission of the European Communities *Communication from the commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions* Brussels, 27.6.2007 COM (2007) 359 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/> [accessed on 10/08/2017].

⁷³² A mitigation of flexibility and social security including employment security.

⁷³³ Alena Nešporová, Sandrine Cazes. *Combining flexibility and security for employment and decent work in the Western Balkans SEER* - South-East Europe Review for Labour and Social Affairs 02:7-23. <https://www.ceeol.com/search/article-detail?id=104574>

⁷³⁴ Auer P Berg J and Coulibaly I *Insights into the tenure* 14-28.

legislation and social protection.⁷³⁵ Regarding the right to a fair public hearing before an independent and impartial court or tribunal in section 34, the Constitutional Court ⁷³⁶ held that Labour Court's supervisory functions in respect of CCMA arbitration awards, enables parties to enforce their sections 23 and 33 rights before the CCMA acting as an impartial tribunal. As such, the Constitutional Court concluded that in this context those rights "in part overlap and are interconnected."⁷³⁷

According to, Cora Hoexter,⁷³⁸ arguing from administrative law perspective, section 33 fairness process making is concerned with giving people an opportunity to participate in the decisions that will affect them. Through section 33 the public is afforded a crucial opportunity to influence the outcome of decisions affecting them. Such participation is a safeguard that

⁷³⁵ See the interpretation of this approach in Alena Nešporová, Sandrine Cazes. *Combining flexibility and security for employment and decent work in the Western Balkans SEER* - South-East Europe Review for Labour and Social Affairs 02:7-23. <https://www.ceeol.com/search/article-detail?id=104574> page 8 explaining that,

The term 'flexicurity' stems originally from a Dutch law (Wet Flexibiliteit en Zekerheid, dated 1999) that holds out the prospect of permanent employment to temporary agency workers after two years' work, and thus links employment security with flexible assignments of staff. However, the term has been extended to mean, more generally, labour market settings that provide security for more flexible employment relations. The extended concept implies a new combination of employment security provided at the firm level (through employment protection legislation and collective agreements) and protection provided through the social protection system in the form of unemployment insurance/assistance and active labour market policies. The flexicurity approach advocates a certain degree of rearrangement between employment protection legislation and social protection so as to permit an optimal combination of labour market performance and workers' security but not at the expense of economic performance (see Auer, Berg and Coulibaly, 2004). However, there is no one-size-fits-all flexicurity model and different combinations of employment protection legislation and social protection (also with different forms of social protection, i.e. combinations of active and passive labour market policies), associated with national differences in tradition and culture but also with variations in the structure of national economies, as well as other factors, might produce results acceptable for all the parties concerned. Both employment protection and labour market policies are important in providing security for workers.

⁷³⁶ *Sidumo* above note 180 Per Sachs J paras 142-159.

⁷³⁷ *Sidumo* above note 180 Per Sachs J para 142-159.

⁷³⁸ Hoexter C *Administrative Law in South Africa* 326-327.

only signals respect for the dignity and worth of the participants but is also likely to improve the quality and rationality of decision making to enhance its legitimacy.⁷³⁹ It is argued that if the interpretation of section 33 would be applied to labour law decision making, it may be regarded as putting to the pedestal the importance of the recognition of employee interests, bearing in mind the imbalanced nature of the employer and employee relationship.⁷⁴⁰ Otto - Kahn Freund neatly captures the nature of employer and employee relationship where he states that:

*[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment.' The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.*⁷⁴¹

The cracks of fairness from a labour law jurisprudential perspective expose yet another purpose of a fair procedure. As a philosophical phenomenon, procedural fairness in the workplace seeks to enforce good workplace governance. In essence, the observation of fair hearing is not only morally right but leads to attaining transparency in the workplace. Accordingly, a transparent environment enables employees to understand the value of employer-set rules and to accept consequences in breach of such rules. Within the pursuit of transparency, when the employer exercises fair procedure, the employer does not only seek to expose his understanding of

⁷³⁹ Hoexter C *Administrative Law in South Africa* 326-327.

⁷⁴⁰ Davies and Freedland *Kahn-Freund's Labour and the Law* at 18.

⁷⁴¹ Davies and Freedland *Kahn-Freund's Labour and the Law* at 18.

the internal rules but also aims to satisfy the constitutionally required standards.⁷⁴² At the centre is the need to satisfy the constitutionally entrenched principle of employment as a core value of the LRA.⁷⁴³

In the light of the above entrenched constitutional objectives in sections 23, 33 and 195 of the Constitution, it remains questionable in the context of this thesis, whether in the circumstance where the employer investigates an employee who is alleged to have committed a criminal misconduct without taking into account the involved constitutionally entrenched section 35 rights for criminal suspects complies with constitutional fairness. Further, it can be questioned if indeed the satisfaction of only the first leg of fairness principles, namely that both sides must be heard and not touching on the need to not judge any man on his own cause as envisaged in employer criminal investigations is a true reflection of substantive fairness in matters of a criminal law nature.

Bearing the fact that each case has to be treated on its own merits and that the circumstances of each case, this thesis does not support the jurisprudentially supported ignorance of the important provisions of the Bill of Rights in the labour law perspective when dealing with criminal misconduct dismissals. The thesis argues that the nature of the misconduct must determine the selection of principles that the employer ought to use to deal with the matter at hand.

It is a bit amiss to submit that a lower level of substantive fairness is observed in labour law perspective as compared to substantive fairness in criminal justice, even in employer criminal investigations and dismissals based on criminal misconducts. However, from a jurisprudential view, it suffices to argue that in labour law, substantive fairness would have been satisfied where employer shows merit to the allegations levelled against the

⁷⁴² Of accountability, responsiveness and openness entrenched in section 1(d) of the Constitution. As well as fair, reasonable and rational.

⁷⁴³ *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at paras 37-38.

employees who committed criminal misconducts. The employer need not only table enough information to the determination that the employee has indeed transgressed but ought to also show that the details of substantive fairness observed in matters of a criminal law nature were complied with. Concisely every attempt must have led to answering the question as to whether the employee had breached a valid rule and went further beyond the rationales of the rules that the employer followed. The employer, in short, would establish that the dismissal resulted from the employee's transgression of a rule, policy or law; and nothing more or less.

Contrary to this apprehension, the current jurisprudence⁷⁴⁴ reveals that in the context of employers' criminal investigations aimed at dismissing employees who committed criminal misconducts, there is no need for the CCMA's review. In accordance with this jurisprudence, the CCMA ought not to ponder on the constitutionality of the rules themselves and on how their determination transgresses on other constitutional demands. The reading of the reasoning in this jurisprudence exposes that, provided that the employer can motivate and justify the decision to dismiss before the CCMA, it is enough. Such a direction leaves the employer with lavish measure of flexibility while limiting employees from any further protection in case the applied rule does not agree with some constitutional rationality. Such an example is in the case of dismissal based on investigations contrary to section 35 of the Constitution.

The lavish measure of flexibility and ignorance of proportionality in employer criminal investigations leaves managers an opportunity to slavishly follow companies' disciplinary matrix without having regard to the circumstances of matters where the cause of action is a criminal misconduct. In

⁷⁴⁴ Including the following cases *Carephone (Pty) Ltd v Marcus NO and others* 1998 11 BLLR 1093 (LAC); *Shoprite Checkers (Pty) Ltd v Ramdau NO and others* [2001] 9 BLLR 1011 (LAC); *Sidumo* above note 180 paras 78-79 ; *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others* 2009 11 BLLR 1128 (LC); *Herholdt v Nedbank Ltd* 2012 9 BLLR 857 (LAC); *Herholdt v Nedbank Ltd* 2013 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd; (Kloof Gold Mine) v CCMA and others* 2014 1 BLLR 20 (LAC)

consonance with *Sidumo*,⁷⁴⁵ it is considered that the arbitrator as a 'reasonable decision maker' must apply its own sense of fairness in deciding whether a dismissal was fair. The principle that the arbitrator has no obligation to exercise deference to the employer's decision excludes any possible opportunity to dig deep in the nature of rules and therefore procedure followed. The employer could successfully defend their decisions by furnishing evidence supporting their decisions and not delve into the rationality of their decisions. They are not expected to convince the arbitrator that they went further than observing the internal rules, statutes and policies and delved into the affected section 35 of the Constitution rights pertaining to criminal suspects.

The employer only has to explain its decision with reference to its business and the impact of the employee's misconduct.⁷⁴⁶ In accordance with the principle of flexibility engaged in employment law fairness, the employer would then equate its decision to the ultimate sanction, which is normally dismissal in matters of criminal misconduct. The employer decides on a balanced sanction by considering the circumstances of the offence, the circumstances of the employee as well as the interests of the employer and the other employees and nothing less or more. Factors such as the risk of continued employment of the employee; the message sent to other employees regarding misconduct of that nature; and a lack of acknowledgement of wrongdoing and remorse on the part of the employee, are considered essential.⁷⁴⁷

The breakdown of the trust relationship is very important in relation to dismissal, but it is not something that an employer can simply declare, and have it accepted as fact. The employer has a duty to establish its extent. In *Edcon Ltd v Pillemer NO and Others*⁷⁴⁸ the SCA held that employers need

⁷⁴⁵ *Sidumo* above note 180 paras 78-79.

⁷⁴⁶ On the impact of dishonesty constituting criminal misconduct read Newaj K 2016 *THRHR* 429-442 at 433.

⁷⁴⁷ *De Beers Consolidated Mines (Pty) Ltd v CCMA & Others* 2000 9 BLLR 995 LAC)

⁷⁴⁸ *Edcon Limited vs Pillermer NO & Others* 2009 ZASCA 135 ;2010 1 BLLR 1 (SCA).

only to provide evidence to support their claims only to demonstrate how the trust relationship has been destroyed by the conduct of the employee. The requirement that employers only demonstrate the extent of damage on their relationship with the employee suspected of criminal misconduct omits the need to observe fair processes which are equally important when dealing with criminal misconducts.⁷⁴⁹

The employees' role as far as whether fair reason existed in their dismissal is within the requirement in section 192(1). In terms of this section, they are required to establish the existence of the grounds for dismissal. Once established, the onus shifts to the employer, who must prove, on a balance of probabilities, that the dismissal was for a fair reason and in accordance with a fair procedure.

The onus is discharged, only if the employer can demonstrate through credible evidence that its version is more probable or more acceptable than that of the employee. The required standard on a balance of probabilities is too limiting a requirement in matters of a criminal law nature. When used it draws several prejudices to the criminal suspect. The employee criminal suspect is left susceptible to losing protection entrenched in the section 35 fairness principles mandatory in matters of a criminal law nature.

3 2 Theoretical implications of LRA disciplinary processes for criminal misconduct

As indicated earlier in chapter two, South African labour law has its system of labour law discipline rooted in corrective discipline regardless of its identified faults when viewed from the industrial relations perspective as explained in chapter two. To add on to this challenge, even though there is a major theoretical commonness between discipline in labour law and criminal law sanctioning, procedures adjacent to each, are completely different as shown earlier. As seen above, within the context of LRA, the discipline of employees suspected of criminal misconduct follows informal

⁷⁴⁹ As demanded in section 35 of the Constitution.

civil procedure processes. This excludes such suspects from protections offered in the law designated for disciplining criminal behaviour.

As it will be seen in the upcoming discussions, criminal law is more formal and strictly adheres to constitutionally entrenched criminal law-oriented principles of fairness entrenched in section 35 of the Bill of Rights. Unlike the basis of fairness in labour law aiming at certifying only the first leg of the natural justice principles, section 35 entail the satisfaction of both legs of the natural justice principles- the *audi alterum partem* rule and *judex in propria sua causa* rule. This thesis criticises this disparity as unjust regarding the nature of matters involving criminal misconduct.

The obvious is that the solution for this problem cannot be found within the existing foundations of labour law as labour law arbitration seeks to do. It will be shown in chapter four that insistence on corrective discipline in pursuit of employer flexibility will forever breed injustices instead of the envisaged constitutional justice in the constitutional era.

On the same note, regarding ensued civil sanctions against criminal misconducts, it is an argument in this thesis that the sanctioning of criminal misconduct within corrective approach theories is marred with faults. The major fault is, amongst others in the foundations of labour law theories of discipline seeking to negate the rationale of punishment of criminal behaviour. As noticed above, discipline in labour law largely relies on the amalgamation of deterrence and rehabilitation principles of punishment that aim to validate labour law disciplinary processes based on flexibility.

Unlike its original perspective of criminal justice, labour law has easily twisted the interpretation of deterrence and rehabilitation to accommodate the principle of employer flexibility primarily founding employer and employee relationship.

It has been argued that disciplinary processes in labour law insist on applying private law and therefore civil law procedure on criminal misconducts, with the hope to ignore integral rationales and procedure

necessarily intended for matters of a criminal law nature.⁷⁵⁰ Progressively, the divergence unfolding in the application of labour law of discipline waters down the ensued theoretical convergence between criminal justice principles of punishment and labour law principles of discipline.

This procedural divergence ignores the importance of adhering to rationales for punishment in matters of a criminal law nature. As shown in the forthcoming text, the criminal justice rationales are purposely adopted to mitigate against injustices associated with their ignorance. At the centre of these injustices is the negation of constitutionally entrenched rights of criminal suspects.⁷⁵¹

While criminal law insists on respect of suspected individual to attain fairness, labour law understanding of fairness centres on employer discretion to decide whether the employee has breached the employer's trust.⁷⁵² In this pursuit, the employer is not bound to respect the criminal suspects' rights observed in dealing with matters of a criminal law nature. The rationale that underpins disciplinary process for employee criminal misconducts is borne from progressive disciplinary perspectives.

As indicated earlier, progressive disciplinary perspective supports flexibility in disciplinary discretions entrusted on the employer and seem to overlook individual employee interests. This becomes obvious in matters of employee criminal misconduct, which demand a degree of proportionality. The insistence on flexibility sacrificing proportionality ponders very far from the rationales for punishing criminal behaviour. Very precise to what was

⁷⁵⁰ As argued in chapter two para 2 2 4 dealing with principles underlying discipline of employees suspected of criminal misconduct. Refer to the following authorities including the following cases *Carephone (Pty) Ltd v Marcus NO and others* 1998 11 BLLR 1093 (LAC); *Shoprite Checkers (Pty) Ltd v Ramdaw NO and others* 20019 BLLR 1011 (LAC); *Sidumo* above note 180 paras 78-79 ; *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others* 2009 11 BLLR 1128 (LC); *Herholdt v Nedbank Ltd* 2012 9 BLLR 857 (LAC); *Herholdt v Nedbank Ltd* 2013 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd; (Kloof Gold Mine) v CCMA and others* 2014 1 BLLR 20 (LAC).

⁷⁵¹ Section 35 of the Constitution

⁷⁵² See *Gogo v University of KwaZulu-Natal & Others* 2007 28 ILJ 2688 (D); *Chirwa v Transnet Ltd & Others* 2008 29 ILJ 73 (CC); *Baloyi v Minister of Communications & Others* 2013 34 ILJ 890 (LC), as well see Grogan J *Dismissal* (2018) 212.

earlier captured by Cameron,⁷⁵³ that even though flexibility is deemed appropriate in the context of industrial relations, it ought to be controlled within appropriate boundaries that respect essential fairness depending on the circumstances of a case.

Essential fairness in matters of a criminal law nature demands the observance of proportionality. Without a fault of proportionality, employer criminal investigations for dismissal of employees who committed criminal misconducts would be marred with irrationality.

3 2 1 The investigation of employees who committed criminal misconducts by the employer to establish reasons for dismissal

Before the employer dismisses the employee, the employer primarily investigates the employee with a view to establishing charges or complaints against the employee. To establish the truth of the allegations, the employer must also invite the employee to come forth and offer its version of the story. In other words, the employer is under obligation to provide the employee an opportunity to establish the basis of its defence in cases where the employee is alleged to have committed a criminal misconduct.⁷⁵⁴

In terms of the law, the employee may in this regard choose whether to accept this invitation or not. In case the employee chooses otherwise, the employer will not be stopped to continue with its decision to dismiss the employee, if the employer has at their disposal facts that support the employee's transgression.⁷⁵⁵ This scenario can be interpreted as complex in the sense that the employee is subjected to trading any other involved rights, which might be at stake. In particular, an employee criminal suspect has constitutional rights afforded to criminal suspects. At the centre of these rights is the determinations and stipulations of what ought to be fair

⁷⁵³ Cameron E 1986 7 ILJ 185 -186 at p187.

⁷⁵⁴du Toit D etal *Labour Relations Law* 461.

⁷⁵⁵Grogan J *Dismissal* (2018) 213.

procedure and substantive fairness in matters of a criminal law nature.⁷⁵⁶ These were postulated in chapters one and two as the rights enshrined in section 35 of the Constitution. In the next part of this chapter the foundational principle underlying section 35 of the constitution principles are dealt with.

In effect, substantive fairness and fair procedure for matters of a criminal law nature are underlined by principles aiming at securing proportionality. Section 35 of the Constitution enshrines these principles.

3 2 2 Principles underlying entrenched section 35 constitutional justice for criminal suspects including employee criminal suspects

The constitutional era transformed and re-emphasised social contract principles.⁷⁵⁷ By constitutionally entrenching social contract principles pertaining to criminal persecution,⁷⁵⁸ South African society is now based on democratic values, social justice and fundamental human rights.⁷⁵⁹ Consequently, the right interpretation of what purpose justice serves⁷⁶⁰ is that, it promotes values⁷⁶¹ of human dignity, equality and freedom. The Constitution demands recognition of these values in every human undertaking, be it a private⁷⁶² or public⁷⁶³ concern.

The constitutional provisions at the centre to the recognition of these values regarding private engagements are the constitutional guidelines in sections

⁷⁵⁶See section 35 of the Constitution entrenching the right to fair trial in criminal matters. Read it with *S v Orrie and Another*, 2005 1 SACR 63(C) at 69(i) to 70(c) per Bozalek J; also read *S v Sebejan and Others* 1997 8 BCLR 1086 (T) per Satchwell J Page 1096 at para 56.

⁷⁵⁷Klare K 1998 *SAJHR* 146 158.

⁷⁵⁸Including section 35 of the Constitution.

⁷⁵⁹Klare K 1998 *SAJHR* 146 158.

⁷⁶⁰Klare K 1998 *SAJHR* 146 158.

⁷⁶¹Section 165(2) of the Constitution.

⁷⁶²*Pharmaceutical Manufacture Association of South Africa In Re: The Exparte Application of the Republic of South Africa* 2000 2 SA 674 (CC) 49 also read *Du Plessis v De Klerk* 1996 3 SA 850 (CC), *Barkhuizen v Napier* 2007 5 SA 323 (CC) and *NM v Smith* 2007 5 SA 250 (CC).

⁷⁶³*Pharmaceutical Manufacture Association of South Africa In Re: The Exparte Application of the Republic of South Africa* 2000 2 SA 674 (CC) 49.

8 and 35, of the Constitution. Through these provisions everyone, be it a natural or a juristic person has to recognise and apply the rights in the Bill of Rights in day to day dealings, even in resolving clashes between one individual and another. These provisions also subject the courts, tribunals, the legislature and the executive to the constitutional demands. According to these provisions, the legislature cannot legislate against the Bill of Rights. The executive cannot implement the law against the Bill of Rights. The courts⁷⁶⁴ cannot interpret or allow as justiciable an attempt to interpret and apply the law contrary to the Bill of Rights except where the Constitution has allowed for such deviation.⁷⁶⁵

Through judicial review, the Constitution has mandated courts to keep guard of a proper observance of democratic values, social justice and fundamental human rights. As Monyakane⁷⁶⁶ reckoned, for the courts to effectively guard constitutional interest, the Constitution established the extent of and limits to judicial review. It demanded a judiciary that is conscious of the values underlying the Constitution. Further, the Constitution requires⁷⁶⁷ the judiciary that interprets the Constitution while bearing in mind the involved technique of making constitutional choices.⁷⁶⁸ It recommends that the judiciary should balance competing fundamental rights and freedoms.⁷⁶⁹

The Constitution mandates that the judiciary refers to a system of values extraneous to the constitutional text.⁷⁷⁰ However, such text must be immanent within the legal order and weaned from personal or political

⁷⁶⁴ *Pharmaceutical Manufacture Association of South Africa In Re: The Exparte Application of the Republic of South Africa* 2000 2 SA 674 (CC) 45; also see *Mahambehlela v MEC for Welfare, Eastern Cape and Another* 2002 1 SA 342 (SE).

⁷⁶⁵ See section 36 of the Constitution. The limitations clause.

⁷⁶⁶ See Monyakane M *An evaluation of the administrative justice in South Africa* 37.

⁷⁶⁷ See Monyakane M *An evaluation of the administrative justice in South Africa* 37 as well as Mureinik E 1994 SAJHR 31, 32; Klare K 1998 SAJHR 146; Burns Y 2002 SAPL 283; *Shabalala v Attorney-General, Transvaal* 1995 (12) BCLR 1593 (CC).

⁷⁶⁸ See Monyakane M *An evaluation of the administrative justice in South Africa* 37 as well see Mureinik E 1994 SAJHR 31, 32; Klare K 1998 SAJHR 146; Burns Y 2002 SAPL 283; *Shabalala v Attorney-General, Transvaal* 1995 12 BCLR 1593 (CC).

⁷⁶⁹ *State v Zuma* 1995 4 BCLR 401 (CC) 17.

⁷⁷⁰ Section 39 of the Constitution.

whims.⁷⁷¹ What these provisions relate is that ,instead of the application of pure political theory attributes established above, the modern social contract is founded in the Constitution. The society must align with constitutional guidance in its undertakings and decisions. The law and its application must be constitutionally compliant. Failure to do that intrigues the action of courts as bodyguards of the South African Constitution entrenching the social contract. Ironically, labour law judicial review is not as wide as the Constitution demands. Review in labour law is limited to what the LRA demands.⁷⁷²

Grogan⁷⁷³ neatly captures questions to assimilate in satisfaction of these demands. Recognising that misconduct cases have their own facts and merits, he relates that, central to every case is the need for employers or judges and arbitrators first to seek answers as to whether there was a contravention of a rule regulating conduct in the workplace, or of relevance to the workplace. Second, to find out if the rule is reasonable and valid.⁷⁷⁴ Third, to establish if the employee was aware of the rule or could reasonably have been expected to know it. Finally, to ask if the dismissal was an appropriate sanction.⁷⁷⁵ Looking at these essentials, it suffices to say that, the nature of a review guideline from a labour law perspective is limited.

With particular reference to cases involving dismissals on the basis of criminal misconducts, the employer's decision to dismiss cannot be reviewed by the CCMA to the extent that the employer's decision may be interrogated as to whether it complied with these demands and something more.

Accordingly, Sidumo⁷⁷⁶ states that, "the right to fair labour practices, in the present context, is consonant with the right to administrative action that is

⁷⁷¹ Also see Mokgoro J's reasoning in *State v Makwanyane*, 1995 6 BCLR 665 (CC) 302-304.

⁷⁷² *Sidumo* above note 180 paras 80-141.

⁷⁷³ Grogan J *Dismissal* (2018) 213.

⁷⁷⁴ Grogan J *Dismissal* (2018) 213.

⁷⁷⁵ Grogan J *Dismissal* (2018) 213.

⁷⁷⁶ *Sidumo* above note 180 at para 112.

lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal.⁷⁷⁷ In the present context, these rights in part overlap and are interconnected.⁷⁷⁸ Contrary to a justiciability review envisaged in section 33 of the Constitution, with regard to reviews pertaining to criminal misconducts, it seems that it is not of importance to take into account that while the employer sought to satisfy these demands, the employer trampled on the employee suspected of criminal misconducts' right to protections within section 35 of the Constitution.

The established view, triggers the pursued chapter one observation that even though labour law processes for dismissal on the basis of the misconduct of a criminal nature aim at punitive civil sanctions with an impact similar to criminal law remedies, they are amounting to "[authorised] punitive civil sanctioning without the stringent safeguards of criminal law."⁷⁷⁹ This aspect operates against constitutional rationales safeguarding criminal persecutions. Criminal persecutions must comply and satisfy the political theory underlying criminalisation of certain human acts in South Africa.⁷⁸⁰

3 2 3 Foundational principles for constitutional fairness

The concept of natural justice is linked to the development of the theory of law pertaining to the protection of individual rights and therefore like the purpose of administration of justice in democratic South Africa. Born from

⁷⁷⁷ The right in terms of section 34 of the Constitution to have a dispute resolved before an impartial tribunal underscores the point made in relation to the first issue, namely, that the commissioner must act impartially.

⁷⁷⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC); 1998 12 BCLR 1517 (CC) at paras 112 and 114.

⁷⁷⁹ Lynch G E 1997 *Corporate Misconduct* 23-65. As well see Henry M and Hart Jr 1958 *Law and Contemporary Problems* 401, 417- 422; also see Parker, H L. *The Limits of the Criminal Sanction* 9; Steiker, C 1997 GEO. L.J. 775.

⁷⁸⁰ These were discussed in chapter two at para 2 2 1 1 dealing with the political theory underlying criminalisation of human acts in South Africa today.

the idea of *jura naturale*,⁷⁸¹ natural justice encompasses the principles of *audi alteram partem* and *nemo judex in propria sua causa*.⁷⁸² Marshall⁷⁸³ neatly captures the role of these principles as follows:

*Principles of natural justice are not only a part of natural law but are that part of natural law which relates to the administration of justice. That is to say, the two principles that no man shall be judged in his own cause and that both sides must be heard are so necessary for the fair administration of justice that they have been accepted as fundamental for that purpose.*⁷⁸⁴

Locke's⁷⁸⁵ theory of law also explains the purpose of these principles. His interpretation of natural justice, which protects individual rights, is based on the theory of natural law, which is in turn based on the concept of social contract.

The concept of social contract describes the process of transformation of humans ("man") from the free state of nature, which lacked governance, to humanity.⁷⁸⁶ In order to be civilised, humans are said to have surrendered their fears and the dangers associated with their state of nature and reached a common agreement on the nature of natural rights.⁷⁸⁷ In this way, Locke makes natural law the starting point of his theory. For him, the main purpose of natural law is to explain the foundation and maintenance of legal order.

⁷⁸¹ Marshall *Natural Justice* 6, where he explains that *jus naturale* or natural law "was originally the Stoic philosophical conception of a universal idea of good conduct upon which all law should be founded and which, some asserted, ought not to be overridden by any other laws however made."

⁷⁸² Marshall *Natural Justice* 12.

⁷⁸³ Marshall *Natural Justice* 12.

⁷⁸⁴ Marshall *Natural Justice* 12 (my emphasis).

⁷⁸⁵ Locke J *Two Treatises on Civil Government* 2, where he writes: "since no man or society of men having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another, whenever anyone shall go about to bring them into such a slavish condition they will always have a right to preserve what they have not a power to part with and rid themselves of those who invade this fundamental, sacred and unalterable law of self- preservation for which they entered into society. And thus, the community may be said in this respect to be always the supreme power."

⁷⁸⁶ Locke J *Two Treatises on Civil Government* 2.

⁷⁸⁷ Locke J *Two Treatises on Civil Government* 2.

He argued that natural justice provides that the right of people to establish the legal order that protects individual rights is a primary right and, as such, original and inalienable.

Locke's⁷⁸⁸ understanding which is very close to the constitutional expression of criminal justice in South Africa, states that in order to maintain good conduct in criminal administration, there ought to be a supreme law that cannot be easily altered, and which sets the extent of and limits to administrative discretion on human rights. In order to promote effective public administration, the aim of natural justice as well as South African constitutional administrative justice is to maintain accuracy, efficiency, effectiveness and accountability in decision-making and to impose a duty of fair hearing upon every decision-maker so that individual rights are protected.⁷⁸⁹

Today, the twin principles of natural justice are still necessary. They are the basic elements of the right to fair trial entrenched in section 35 of the Constitution. Section 35 of the Constitution is integral to criminal justice in South Africa. Fairness⁷⁹⁰ has therefore become the basis of criminal justice

⁷⁸⁸ Locke J *Two Treatises on Civil Government* 2.

⁷⁸⁹ See the decision in *R v Home Secretary, ex parte Hosenball* 1977 (1) W L R 766 772, which held that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done." Section 33 of the Constitution read with the Preamble, section 1 and 195 of the Constitution promote the protection of individual rights by urging that public administration must be carried out accountably.

⁷⁹⁰ Accordingly, Monyakane above note 9 at 11 fn 43 observed the nature of fairness in the following words;

The demand for fairness varies from case to case. Fairness prescribes the best way to achieve a certain objective and relates to the underlying values in the undertaking. Procedural fairness then relates to the best way to undertake a decision based on the prescriptions of the law and the circumstances that the decision-maker is facing. Procedural fairness can encompass both rationality and reasonability, although it may not mean that what is rational is fair or what is reasonable is fair.

Concomitant to this observation Baxter L B *Administrative Law* 482 explains reasons that;

what is rational can depend entirely upon one's personal values, aims and emotions and what is reasonable contains moral and social

entrenched in the Constitution. These are embedded in the principle of legality embodying the rationale for criminal justice. As far as labour law is concerned, only one leg of the principles of natural justice is satisfied.

Against the principle of legality, the employer's criminal investigatory powers are marred with flexible choices including non-observance of rights of criminal suspects within which employees who have committed criminal misconducts fall. Employees, by contrast, are left to choose between losing employment and engaging in processes that incriminate them. They can either claim or not claim the right against self-incrimination at their own peril.⁷⁹¹ These circumstances fail the rationales of the principle of legality as understood in the current constitutional era.

3 2 4 The principle of legality from a South African criminal justice perspective

The South African Constitution, as the supreme law from which every power affecting individual rights emanates and is controlled, expresses Dicey's notion of the rule of law in this regard.⁷⁹² For Dicey⁷⁹³, the rule of law also means equality before the law. "[E]quality before the law as expressed by the rule of law excludes the idea of any exemption of officials or others from the duty to obey the law which governs other citizens or from the jurisdiction of the ordinary tribunals."⁷⁹⁴

This understanding is expressed in the reading of the Preamble, sections 1, 8, 9, 23, 33, 35 and 39 of The Constitution regarding the observance of

overtones; reasonableness is a social concept which relies on an appeal to reasons accepted or recognised by others.

Also see the holding in *MacLean v The Workers Union* 1929 (1) Ch. 602, 624 explaining that the duty to act fairly is therefore an integral principle in the promotion of justice. It serves two purposes: firstly, it makes the decision makers to be answerable for their actions if they act unfairly and secondly, it provides room for questioning where unfairness is suspected: It therefore controls decisions in that if found to be unfair they will affect justice.

⁷⁹¹ Grogan J *Dismissal* (2018) 419-420.

⁷⁹² Read section 1 of the Constitution, the Preamble, section 8 and 29 of the Constitution.

⁷⁹³ Dicey *Study of the Constitution* 202.

⁷⁹⁴ Dicey *Study of the Constitution* 202.

individual rights in taking decisions affecting them. Sections 8 and 39 in particular, entrench the need to consider the Bill of Rights provisions even in private engagements. Section 39 calls for courts and tribunals to consider, not only domestic human rights but also international as well as foreign deliberations on human rights. Section 35 falls within the Bill of Rights provisions. It establishes the rights of every criminal suspect including employees who are suspected of criminal misconduct. It is therefore important that its provisions are not ignored in relevant matters. The investigation and discipline of employee criminal suspects falls within a category of matters subject to the application of section 35 because they are matters of a criminal law nature.

The employer criminal investigations and hearings based on the employee's criminal misconduct create imbalances because the employer does not observe the rights of individual employee criminal suspects. While other criminal suspects are dealt with within the entrenched section 35 protections, the employees suspected of criminal misconducts are not clothed with these protections. They are stripped off these rights because, even if they invoke them, their plea can be easily ignored, and investigations and hearings would go on without their involvement.⁷⁹⁵ This approach defies the rule of law. It is contrary to the demands set in the Preamble, sections 1, 8, 9, 23, 33, 35 and 39 of The Constitution.⁷⁹⁶

Dicey also argues that as the common law expressed the rule of law, it had the capability to protect individual rights. His expression tallies with the Marciano perspective of discipline preferred in this thesis, which expounds that the consideration of individual interest in industrial relations discipline is vital and marks improvement from simply progressive discipline that does not centralise individual employee interests. He⁷⁹⁷ therefore maintains that the violations of individuals' rights can be effectively remedied by common

⁷⁹⁵ See Grogan J *Dismissal* (2018) 213.

⁷⁹⁶ Read together these sections emphasise individual rights based approach to the enforcement of the law.

⁷⁹⁷ Dicey *Study of the Constitution* 202.

law through judicial declarations and therefore the application of natural justice.

This is similar to the attempts by both ordinary courts and the Industrial Courts before the Constitution⁷⁹⁸ came into effect. Both ordinary courts and Industrial Courts that dealt with labour matters before the coming into effect of the Constitution celebrated his notion. During the common law era, the Industrial Court presiding officers were informed with the rationale of natural justice within the call to establish just-cause and thus respected Dicey's perspective of justice. Industrial Courts did not promote employer flexibility at the ignorance of natural justice principles. They judiciously reviewed employer decisions.

However, Dicey's understanding regarding common law courts justice, based on unwritten constitution perspectives of the Westminster system, does not fit the present South African perspective which now expresses the rule of law through a written Constitution as opposed to relying only on common law. The notions of natural justice are now, amongst others, expressions in the Preamble, section 8, section 23, section 33, section 35, section 39 and section 195 of the constitutional fairness principles. In this dispensation, the Constitution improved the position of the common law review. Judicial review is no longer an inherent power of the ordinary courts, but is now a constitutionally entrenched duty, which redefines the role of courts.

As mentioned in chapter one, courts and tribunals now operate within constitutional limits to enforce constitutional objectives and values.⁷⁹⁹ These objectives expressed in section 35 of the Constitution as far as criminal justice is concerned, are of essence in all matters of a criminal law nature such as employee criminal misconduct. Nevertheless, in satisfaction of flexibility, the progressive discipline-oriented perspective adopted in South

⁷⁹⁸The Industrial Courts engaged both natural justice principles in deciding matters of a criminal law nature.

⁷⁹⁹ Klare K 1998 *SAJHR* 146, 158; Mureinik E 1994 *SAJHR* 31, 32.

African labour law might overlook these objectives. This may lead to unfair criminal persecutions.

Central to criminal persecution is punishment that is proportional. Proportional criminal punishment is founded on the central principle that punishment is not a necessary, but rather an appropriate condition for a breach of law.⁸⁰⁰ That there may never be punishment that does not bear reference to an established law. This principle expresses the rationale for punishment in that it requires punishment to conform to specific standards. These specific standards are constitutional standards. If the labour principle of flexibility allows the employer to make choices to follow based on a subjective evaluation of circumstances surrounding criminal misconduct, the inference in this central principle might be reversed. To this extent, there might exist punishment without law, thus basing punishment on undefined principles.

If punishment is sanctioned by the LRA but turns out unfair due to the progressive discipline-oriented model of punishment followed by the employer criminal persecutions, it would be in rejection of CPA-enforced principles. These CPA principles are subjected to the application of section 35 of the Constitution. Entrenched in section 35 principles of fairness negated by the employer approach are foundational criminal justice objectives. Included in section 35 principles are the seminal common law features of the principle of legality, evaluated in the earlier discussion, which enforce proportionality.

As opposed to an objective standard mandated by criminal persecution, the employer uses a subjective analysis of the matter. Earlier in this thesis, employer decisions have been found to be based on the test whether the criminal act committed by an employee renders the continuation of the employment relationship intolerable.⁸⁰¹ Subject to this evaluation, is the employer's pursuit of the master and servant founded principle in breach of

⁸⁰⁰ *nulla poena sine lege* principle.

⁸⁰¹ Item 3(4) of Schedule 8 to the LRA.

relationship of trust. As opposed to the need to attain proportionality, the employer will make its determination of whether the employee charged with a criminal misconduct is guilty of such a criminal misconduct based on the discretion as to whether the employer's trust has broken down to the extent that the employer and employee relationship is untenable.

There are four principles that follow from the fundamental principle that associates punishment and law. The first to chronologically follow is the common law principle that relates furthermore, that persons may be found guilty by courts only where the type of conduct performed is classified as crime under the appropriate law.⁸⁰² This means that courts or tribunals may never create punishment for a crime if that crime is not defined,⁸⁰³ suggesting a human right purported by section 35 of the Constitution that the accused have a right to fair trial and are immune from convictions that could result from actions that were not offenses at the time of the alleged conduct.⁸⁰⁴ The subsequent analysis that sheds light the shortcomings of flexibility in the constitutional context will reveal the principle of *ius praeivium*⁸⁰⁵, which speaks in the same accord.

The third principle of *ius certum*⁸⁰⁶ demands that there ought to be a clear formulation of crimes. The *ius certum*⁸⁰⁷ principle is against punishing a transgressor based on legal prescripts that are ambiguous. Types of crimes

⁸⁰² See Ramosa R (2009) 3 SACJ 553. As well read Shannon H (2007) 20 SACJ78 at 81; Snyman C R *Criminal Law* (2008) 46-7.

⁸⁰³ See *Malgas 2001* 1 SACR 469 (SCA). 472g-h.

⁸⁰⁴ See Ramosa R (2009) 3 SACJ 553. As well read Shannon H (2007) 20 SACJ78 at 81; Snyman C R *Criminal Law* (2008) 46-7.

⁸⁰⁵ Equated to the section 35(3)(1) right against conviction of an offence based on an act or omission that was not an offence under either national or international law at the time of its commission or omission. See *Masiya v Director of Public Prosecutions* 2007 (2) SACR 435 (CC) at paras 51 to 52 Snyman C R *Criminal Law* (2014) 39-49. As well read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸⁰⁶ Consider section 35(3) to the effect that vague or uncertain legislative constitutes no crime. *Hanid* 1950 (2) SA 592 (T) held that ambiguous acts must be interpreted in favor of accused. Also see Snyman C R *Criminal Law* (2014) 39-49 as well as Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸⁰⁷ Can be inferred from the constitutional right to fair trial, in particular section 35(3) to the effect that crimes should be clearly defined and not vaguely presented. Consider Snyman C R *Criminal Law* (2014) 39-49 As well as Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

and related types of punishments must be clearly defined in law. This principle tallies with the “void-for-vagueness doctrine” explained by Katz L, Moore M S and Morse S J.⁸⁰⁸ According to this doctrine, legislatures are required to frame acts with enough clarity to enhance understanding. Vagueness of a law raises ambiguity and breeds inconsistencies between statutory provisions. Such vague law remains a slippery slope for it cannot be comprehended as to what categories of behaviour are entailed in its provisions. Ambiguous laws cause individuals who seek to apply them to ponder on defaulting the due process of law. It breeds inequalities in the application of law. Enforcement officials whose discretion relies on such ambiguous prescripts would be descending into a Pandora box of discrimination. Their penultimate justice will be disproportionate.

The last principle to follow from the fundamental *nulla poena sine lege* is the *ius strictum*. This ⁸⁰⁹principle calls for a strict interpretation of a crime. *Ius strictum* ⁸¹⁰principle in punishment is to the effect that the statutes criminalising acts and omissions that are lax and breeding ambiguity must be strictly interpreted. The courts and tribunals dealing with such laws cannot by analogy extend the rationale of the statute beyond its limits. In the light of the constitutional principle of fairness, the interpretation of relaxed or too broad statutes must fit the South African objectives of criminalisation expressed in section 35 of the Constitution.

In satisfaction of the rationale for the principle of legality regarding criminalisation and punishment of perpetrators, all the above stated principles are echoed in the subsequent processes of punishment to individuals who are alleged to have committed criminal acts.

⁸⁰⁸ Katz L *et al* (eds) *Foundations of Criminal Law* 193-195. Also refer to Snyman C R *Criminal Law* (2014) 39-49.

⁸⁰⁹ See court decisions to this effect in *Masiya v Director of Public Prosecutions* 2007 (2) SACR 435 (CC) at paras 51 and 52 read with *S v Masiya* 2006 2 SACR 357 (T) para 61 as well as *S v Mshumpa* 2008 (1) SACR 126 (E). Read Snyman C R *Criminal Law* (2014) 39-49. As well, read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸¹⁰ Expressed in *Masiya v Director of Public Prosecutions* 2007 2 SACR 435 (CC) at paras 51 and 52 read it with *S v Masiya* 2006 2 SACR 357 (T) para 61 as well as *S v Mshumpa* 2008 1 SACR 126 (E). Also read Snyman C R *Criminal Law* (2014) 39-49. As well, read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

Snyman,⁸¹¹ explained the rationale for this link to be a connection to policy consideration emphasising on *the prior warning of people*. Thus, the law lets people know that certain acts are legally criminalised and therefore *punished in a particular way* so that they do not commit such acts or else be ready to suffer specified consequences if they commit the prohibited acts. It can be argued that through these well-established procedures, people are forewarned as to the processes to be followed in dealing with the persons who committed criminalised acts or omissions.

Neatly couched by Katz L, Moore M S and Morse S J,⁸¹² the principle of legality is dependent on four values, namely, fairness, liberty, democracy and equality. Concomitant to the above discussion on legality, Katz L, Moore M S and Morse S J,⁸¹³ argued that the principle of legality does not classify as fair a law that abruptly criminalises acts or omissions which were not so criminalised at the time perpetrated.⁸¹⁴ They added that such law would surprise citizens. They are also of the view that legality is prone to law that protects individual liberty. This is true because, through this virtue, the content of the criminal law is made known to citizens in advance and well enough so that they can account for their transgressions.

Katz L, Moore M S and Morse S J,⁸¹⁵ also align the nature of criminal law to authority as they reckoned that criminal sanction ought to emanate from appropriate authority. Only the elected legislature ought to decide *what is and what is not criminal*. Legality is against courts and tribunals that *make*

⁸¹¹ Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸¹² Katz L *et al* (eds) *Foundations of Criminal Law* 193 at 194-195. Also see Snyman C R *Criminal Law* (2014) 39-49.

⁸¹³ Snyman C R *Criminal Law* (2014) 39-49. As well read Katz L *et al* (eds) *Foundations of Criminal Law* 193 at 194-195.

⁸¹⁴ Similarly, Ramosa R 2009 SACJ 353-370, at 370, argues that an attempt to punish what was not subject to punishment at the time of commission is against the constitutional rule of law. The same argument comes from Snyman CR 2007 SALJ 677 at 677-678 who considered the constitutional court's decision to positively find the accused guilty of committing an act which was not criminalised under common law nor statutory law as an overstep of judicial function and therefore violating the principle of legality that no man must be punished without the law. Law first and punishment later Snyman and Ramosa argue.

⁸¹⁵ Snyman C R *Criminal Law* (2014) 39-49. As well, read Katz L *et al* (eds) *Foundations of Criminal Law* 193 at 194-195.

a conduct criminal and *punish* it without statutory authorisation. Adding on to their perspective, it is not one of the rationales of the principle of legality that criminals are arbitrarily differentiated. Similar criminal acts and omissions are not to be investigated, prosecuted and punished differently under different laws. Concisely, punishment of legislated criminal acts and omissions must be prospective, general, clear, consistent, verifiable, strictly construed, and be under defined law.⁸¹⁶ The processes entailing employer criminal investigations and subsequent dismissal processes do not observe these principles even though they seek to discipline criminal misconducts of employees suspected of criminal misconducts.

3 2 4 1 The principle of legality in punishment of criminal misconducts

The maxim *nulla poena sine lege*, meaning no punishment without law,⁸¹⁷ expresses the rationale for punishment in that it requires punishment to conform to specific standards.⁸¹⁸ Thus in law, punishment for alleged criminal conducts should not result from circumstantial whims alone but must be based on well-defined principles.⁸¹⁹

As explained earlier, the four major facets of the *nulla poena sine lege* principle⁸²⁰ apply across all stages of a constitutionally justified criminal persecution.⁸²¹ It is submitted that, even though employers hope at labelling employees suspects with dishonesty (and thereby charge criminal suspects within crimes prescribed in the CPA crime schedules⁸²²) employer criminal investigations procedures and dismissal processes for employees

⁸¹⁶ Snyman C R *Criminal Law* (2014) 39-49. As well read Katz L *etal* (eds) *Foundations of Criminal Law* 193 at 194-195.

⁸¹⁷ Refer to chapter two paras 2 2 to 2 2 4 2.

⁸¹⁸ Refer to chapter two paras 2 2 to 2 2 4 2.

⁸¹⁹ Refer to chapter two paras 2 2 to 2 2 4 2.

⁸²⁰ Read chapter two para 2 2 4 1 on the theory of proportionality and its extent of application in criminal misconduct discipline. The four facets referred to are *ius acceptum*; *ius praeivum*; *ius certum* and *ius strictum*.

⁸²¹ In terms of section 35 of the Constitution read with the CPA.

⁸²² Schedules I-III of the CPA were 2 2 4 2 described to be containing acts of dishonesty which are considered criminal misconducts in labour law.

suspected of criminal misconducts do not follow the proportionality-based CPA procedures. Rather these procedures and processes follow the LRA relaxed processes with the aim of satisfying employer flexibility.⁸²³ As seen earlier,⁸²⁴ flexibility does not observe the principle of legality based on proportionality.

It is argued that as employer criminal persecution is based on Item 4 of the LRA which complies with a flexible procedure, it however, does not comply with specific criminal procedural standards as criminal punishment ought to be, if following the CPA criminal punishment based on proportionality. In the circumstances, the employer could exercise discretion and give two employees who committed the same criminal misconduct different types of punishments.⁸²⁵

3 2 4 1 1 The application of *iu acceptum* principle to punishment

With regard to punishment, *iu acceptum* rule denotes that an accused person must be punished in terms of a defined law, be it common law or statutory law.⁸²⁶ Thus it would be against the rule of law for a court to create punishment for a crime that does not exist in law.⁸²⁷ With reference to constitutional criminal justice, section 35(3)(l) supports the rationale of this principle. This section mandates that accused persons have a right to fair

⁸²³ Chapter two of this thesis makes a distinction between flexibility based criminal persecution and proportionality based criminal persecution. See paras 2 2 4 1 on the theory of proportionality and its extent of application in criminal misconduct discipline and 2 2 4 2 on the theory of flexibility and its extent in criminal misconducts discipline.

⁸²⁴ See paras 2 2 4 1 on the theory of proportionality and its extent of application in criminal misconduct discipline and 2 2 4 2 on the theory of flexibility and its extent in criminal misconducts discipline.

⁸²⁵ On this differentiation, see *Metcash Training Ltd t/a Metro Cash and Carry v Fobb & Another* 1998 19 ILJ (LC); *Anglo American Farms t/a Boschendal Restaurant v Komwayo* 1992 13 ILJ 573 LAC.

⁸²⁶ See *Malgas* 2001 1 SACR 469 (SCA). 472g-h.

⁸²⁷ See Ramosa R "The Limits of Judicial Law Making in the Development of Common Law Crimes: Revisiting the Masiya Decisions" (2009) 3 SACJ 553. As well read Hooror S "Recent cases: Specific crimes" (2007) 20 SACJ 78 at 81; Snyman C R *Criminal Law* (2008) 46-7.

trial, including the right not to be convicted for acts or inactions, which were never offences at the time of the alleged conduct.⁸²⁸

The undefined employer criminal misconduct investigations are a scenario of an undefined law contrary to what the *ius acceptum* rule denotes. The ensued sanctions based on these devoid criminal investigations are anti-constitutional human rights-based objectives. They are an antithesis to the rule of law envisaged in the Constitution.

3 2 4 1 2 The application of *ius praeivum* principle to punishment

*Ius praeivum*⁸²⁹ principle nullifies retrospective punishment regarding alleged acts and inactions of criminal nature. Thus, in pursuit of the right to fair trial, no one must be punished of criminal acts or omissions which were never declared illegal by law at the time of their conduct. Snyman,⁸³⁰ reasoned that the rationale for section 35(3)(l) of the Constitution incorporates this principle in its provision that accused persons cannot be convicted for acts or omissions that were not offences under either national or international law at the time of their commission.⁸³¹

Even though the employer bases its allegations for misconducts on well-established crimes the employer's way of punishment is marred with ambiguities to the extent that the employee may be proactively condemned without establishing the commission of a valid criminal act. The fact that the employer bears no duty of establishing beyond a reasonable doubt that the employee committed the alleged acts of crime is closely connected with an illegality that an employee is dismissed without establishing all elements of the alleged crime. That is indeed tantamount to retrospective justice prohibited by the *ius praeivum* principle.

⁸²⁸ Snyman C R *Criminal Law* (2014) 39-49. As well read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸²⁹ Entrenched in section 35(3)(l) of the Constitution.

⁸³⁰ Snyman C R *Criminal Law* (2014) 39-49. As well, read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸³¹ Snyman C R *Criminal Law* (2014) 39-49. As well, read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

3 2 4 1 3 The application of *ius certum* principle to punishment

The *ius certum*⁸³² principle is against punishing a transgressor based on legal prescripts that are ambiguous. Types of crimes and related types of punishments must be clearly defined in law. This principle tallies with the “void-for-vagueness doctrine” explained by Katz L, Moore M S and Morse S J.⁸³³ According to this doctrine legislatures are required to frame acts with enough clarity to enhance understanding.

It is argued that vagueness of a law raises ambiguity and breeds inconsistencies between statutory provisions. Such vague law remains a slippery slope for it cannot be comprehended as to what categories of behaviour are entailed in its provisions. Ambiguous laws cause individuals who seek to apply them to ponder on defaulting the due process of law. It breeds inequalities in the application of law. Enforcement officials whose discretion relies on such ambiguous prescripts would be descending into a Pandora box of discrimination. Their penultimate justice will be disproportionate.

It is argued further that employers’ exercise of too wide discretions as in the investigation and dismissals of employees suspected of criminal misconducts works contrary to the principle *ius certum*. Too much discretion is left to the employers as to how to investigate as the process to follow is not prescribed with definite criminal procedure processes but the LRA. As seen earlier, the LRA fairness processes are based on flexible and informal measures disregarding the principles of proportionality. These processes breed inequalities. First, the possibility that employees who committed similar criminal misconducts are punished differently. Second, that employee criminal suspects are not afforded fair rights as other ordinary criminal suspects who are treated within section 35 fair rights.

⁸³² Entrenched in section 35(3) of the Constitution. See Snyman C R *Criminal Law* (2014) 39-49 As well, read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸³³ Snyman C R *Criminal Law* (2014) 39-49. As well, read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

3 2 4 1 4 The application of *ius strictum* principle to punishment

Ius strictum ⁸³⁴principle in punishment is to the effect that statutes criminalising acts and omissions and yet are too lax and breeding ambiguity must be strictly interpreted.⁸³⁵ The courts and tribunals dealing with such laws cannot by analogy extend the rationale of the statute beyond its limits.⁸³⁶ In the light of the constitutional principle of fairness, the interpretation of relaxed or too broad statutes must fit the South African objectives of criminalisation expressed in section 35 of the Constitution discussed above.⁸³⁷

It is submitted that the initiative to seek to deal with matters of a criminal law nature within the LRA (as in the employer criminal investigations and dismissals) creates massive challenges. Against the principle *ius strictum*, employers act within too relaxed prescripts offering processes marred with ambiguities. Within these unclear processes, there is a possibility that instead of operating within the constitutional limits in following the LRA employers' discretion is extended beyond constitutional demands.

The obvious situation regarding employer criminal investigations and hearings on matters of a criminal law nature is the employer's failure to observe employee criminal suspects' individual rights within fairness principles entrenched in section 35. Employers' power to investigate criminal misconducts and to dismiss employees suspected of criminal misconducts by far overlook South African objectives of criminalisation expressed in section 35 of the Constitution. In these circumstances, it is trite

⁸³⁴ Entrenched in section 35(3) of the Constitution. Read Snyman C R *Criminal Law* (2014) 39-49. As well, read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸³⁵ Snyman C R *Criminal Law* (2014) 39-49. As well, read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸³⁶ Snyman C R *Criminal Law* (2014) 39-49. As well read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

⁸³⁷ Snyman C R *Criminal Law* (2014) 39-49. As well read Katz L *et al* (eds) *Foundations of Criminal Law* 193-195.

to relate that the employers' criminal investigative procedures and subsequent dismissal hearings are unfair and therefore unconstitutional.

3 2 4 2 Effects of criminal persecution on perpetrators of criminal misconducts

Criminal persecution pursues from the time an individual is identified as a perpetrator and is maintained throughout punishment. Nevertheless, even long after the law had taken its toll, the stigma of being considered a criminal remains.⁸³⁸ Like Keller S K & Harris M P⁸³⁹ reckoned, this stigma is long lasting because it becomes a barrier to the condemned transgressor. South African labour law jurisprudence⁸⁴⁰ reveals that previous criminal pursuits remain a decisive factor as to whether a person can be re-employed after the commission of a criminal misconduct.⁸⁴¹

⁸³⁸ *De Beers Consolidated Mines Ltd v CCMA 2000 9 BLLR 995 (LAC); Fipaza v Eskom Holdings Ltd and Others (JR 2220/08) [2010] ZALC 66; 2010 31 ILJ 2903 (LC) (6 May 2010) Fipaza N P v Eskom Holdings LTD & Others ; Eskom Holdings Ltd v Fipaza and Others (JA 56/10) [2012] ZALAC 40; 2013 4 BLLR 327 (LAC); 2013 34 ILJ 549 (LAC); Absa Makelaars (Edms) Bpk v Santam Versekeringsmaatskappy Bpk & another 2003 24 ILJ 1484 (LC) . As well, read Keller S K and Harris M P 2005 Journal of Contemporary Criminal Justice 6.*

⁸³⁹ *De Beers Consolidated Mines Ltd v CCMA 2000 9 BLLR 995 (LAC); Fipaza v Eskom Holdings Ltd and Others (JR 2220/08) [2010] ZALC 66; 2010 31 ILJ 2903 (LC) (6 May 2010) Fipaza N P v Eskom Holdings LTD & Others ; Eskom Holdings Ltd v Fipaza and Others (JA 56/10) [2012] ZALAC 40; 2013 4 BLLR 327 (LAC); 2013 34 ILJ 549 (LAC); Absa Makelaars (Edms) Bpk v Santam Versekeringsmaatskappy Bpk & another 2003 24 ILJ 1484 (LC) . As well, read Keller S K and Harris M P 2005 Journal of Contemporary Criminal Justice 6.*

⁸⁴⁰ *De Beers Consolidated Mines Ltd v CCMA 2000 9 BLLR 995 (LAC); Fipaza v Eskom Holdings Ltd and Others (JR 2220/08) [2010] ZALC 66; 2010 31 ILJ 2903 (LC) (6 May 2010) Fipaza N P v Eskom Holdings LTD & Others ; Eskom Holdings Ltd v Fipaza and Others (JA 56/10) [2012] ZALAC 40; 2013 4 BLLR 327 (LAC); 2013 34 ILJ 549 (LAC); Absa Makelaars (Edms) Bpk v Santam Versekeringsmaatskappy Bpk & another 2003 24 ILJ 1484 (LC) . As well, read Keller S K and Harris M P 2005 Journal of Contemporary Criminal Justice 6.*

⁸⁴¹ *Whitehead v Woolworths (Pty) Ltd 1999 20 ILJ 2133 (LC) read it with Wyeth SA (Pty) Ltd v Mangle & Others 2005 26 ILJ 749 (LAC) ; Auret v Eskom Pension & Provident Fund 1999 20 ILJ 2133 (LC); De Beers Consolidated Mines Ltd v CCMA 2000 9 BLLR 995 (LAC); Fipaza v Eskom Holdings Ltd and Others (JR 2220/08) [2010] ZALC 66; 2010 31 ILJ 2903 (LC) (6 May 2010) Fipaza N P v Eskom Holdings LTD & Others ; Eskom Holdings Ltd v Fipaza and Others (JA 56/10) [2012] ZALAC 40; 2013 4 BLLR 327 (LAC); 2013 34 ILJ 549 (LAC); Absa Makelaars (Edms) Bpk v Santam Versekeringsmaatskappy Bpk & another 2003 24 ILJ 1484 (LC) . As well, read Keller S K and Harris M P 2005 Journal of Contemporary Criminal Justice 6.*

However, as far as criminal justice in pursuit for proportionality is concerned, there are principles emphasising consistency in dealing with matters of a criminal law nature which serve to mitigate the harsh effects of criminal labelling. These principles are well organised under common law,⁸⁴² statutory law⁸⁴³ and constitutional law⁸⁴⁴ consecutively. The reverse is the starting point for the application of these principles, hence the phrase constitutional criminal procedure. Constitutional criminal procedure must be aligned with common law theories of punishment for criminal behaviour to mitigate the impact of criminal labelling.⁸⁴⁵

3 2 4 3 The rationale for punishment in matters of a criminal law nature

As opposed to condemnation in the state of nature prior to social contract, punishment under constitutional criminal justice must be balanced. As indicated before, the rationale for the punishment of criminal behaviour within constitutional demands aims at attaining proportionality.⁸⁴⁶ It is submitted that within these constitutional demands, proportionality in criminal punishment has four aspects of concern.⁸⁴⁷ Firstly, it avenges the

⁸⁴² The previously referred to maxim of *nulla poena sine lege* and its subsidiaries *actus non facit reum nisi mens sit rea*

⁸⁴³ The Major Act is the Criminal Procedure Act 51 of 1977.

⁸⁴⁴ In particular, section 35 of the Constitution.

⁸⁴⁵ Discussed in chapter two at para 2 2 3 dealing with the impact of criminal labelling.

⁸⁴⁶ Chaskalson *et al Constitutional Law of South Africa* 28-i para 28-1. Marshall *Natural Justice* 12. Criminal proceedings are mainly related to the principle *nemo iudex in propria causa sua* which literally means that human beings should not take the law upon themselves but they must follow a just course. Also see Burchell *et al Burchell E M and Hunt South African Criminal Law and Procedure* at 53ff, who emphasise on the principle *nulla poena sine lege*. Also read Van Zyl D S in Chaskalson *et al Constitutional Law of South Africa* para 28-1 who explains that;

in respect of punishment the principle has at least two implications. First, penalties themselves should be reasonably precisely defined. Secondly, the imposition of such penalties should be governed by clear legal rules, which themselves should meet the requirements of the principle of legality.

⁸⁴⁷ Consider Chaskalson *et al Constitutional Law of South Africa* 28-i para 28-1 read together with Terblanche S S *the Guide to Sentencing in South Africa* 348-349.

offended.⁸⁴⁸ Secondly, it rehabilitates the offender with the intention to make the offender a new person.⁸⁴⁹ In the third place, it shows by example that criminal acts are consistently punishable and fourth, it sets a precedent that prevents future behaviour.⁸⁵⁰ Successfully punishing the offender brings change to those who transgress and maintain the social contract rationales discussed above.⁸⁵¹ The suggestion of criminal persecution is, in doing so that perpetrators ought to be punished in order to be reformed; it is not that they should be perpetually condemned.⁸⁵²

The guiding principles for a proportional punishment are entrenched in section 35 of the Constitution. These are principles embodying fair procedure in criminalisation of individual behaviour. They prescribe steps to be followed for reaching a proportional punishment. The constitutionally entrenched fair procedure principles assign duties to concerned authorities to follow specified principles. Considering these duties, the courts that impose punishment must mould appropriate punishment through a sentence. Judicial sentences must be based on all the circumstances of the case. Thus, the involved circumstances ought to relate to the inception of the allegation, the investigation stage, the trial stage and the post-conviction stage.

The ultimate sentence should be fair in that it is neither too light, nor too severe. An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender; in other words, the sentence should reflect the blameworthiness of the offender, or be in

⁸⁴⁸ Consider Chaskalson *et al Constitutional Law of South Africa* 28-i para 28-1 read together with Terblanche S S *the Guide to Sentencing in South Africa* 348-349.

⁸⁴⁹ Chaskalson *et al Constitutional Law of South Africa* 28-i para 28-1 read together with Terblanche S S *the Guide to Sentencing in South Africa* 348-349.

⁸⁵⁰ Chaskalson *et al Constitutional Law of South Africa* 28-i para 28-1 read together with Terblanche S S *the Guide to Sentencing in South Africa* 348-349.

⁸⁵¹ Consider, Chaskalson *et al Constitutional Law of South Africa* 28-i para 28-1 read together with Terblanche S *the Guide to Sentencing in South Africa*. 2007, 348-349.

⁸⁵² See Chaskalson *et al Constitutional Law of South Africa* 28-i para 28-1 read together with Terblanche S *the Guide to Sentencing in South Africa* 2007 348-349.

proportion to what is deserved by the offender as formally prescribed by the law.

By adhering to the constitutionally entrenched principles of fairness, courts are expected to pass a “proper” sentence while giving full reasons for their decision to find the transgressor guilty. Their decision to convict is very important because it lays a basis for the sentence that the court ultimately passes.⁸⁵³ As to what constitutes a “proper sentence” varies from case to case and probably from jurisdiction to jurisdiction.⁸⁵⁴

For instance, the court ought to consider the crime, the criminal and the offended comprising of the victim and the interests of society to find a proportionate sentence.⁸⁵⁵ That sentence ought to objectively best balance the mentioned considerations with retribution, deterrence, rehabilitation and incapacitation. This is necessary so that an imposed sentence aligns with proportionality principles. In the case of employer criminal investigations and hearings based on criminal misconduct, the sentence would barely meet the proportionality principles because the inception of the proceedings would be based on the wide discretion of the employer grounded on flexibility.

du Toit *et al*,⁸⁵⁶ when explaining the aspect of criminal proceedings within the determination of fair dismissal, exposes the predicament embedded in the employer investigation demands for fairness.

According to du Toit *et al*,

A number of issues arise if the employer alleges that the conduct of an employee amounts to a criminal offence.⁸⁵⁷ Parallel process may take place where an employee faces disciplinary and criminal proceedings

⁸⁵³ See section 146 (a) of the Criminal Procedure Act 51 of 1977; *S v Immelm* 1978(3) SA 726(A) 729 B; *R v Van der Walt* 1952 4 SA 382 (A) 383 D; *R v Henbsch* 1953 2 SA; *S v Masuku* 1985 (3) SA 908 (A) 912 F.

⁸⁵⁴ Jurisdiction of a court determines the extent and nature of the sentences which it may impose.

⁸⁵⁵ The element of the interest.

⁸⁵⁶ du Toit D *et al* *Labour Relations Law* 461.

⁸⁵⁷ Grogan J 2001 *EL* 14; du toit D 2003 *Labour Law News and CCMA Reports* 12; *Mohlala v Citibank* 2003 5 BLLR 455 (IC); *Van Eyk v Minister of Correctional Services* 2005 6 BLLR 1106 (EC).

arising from the same or similar facts. The guiding principle is that such processes are separate and independent of each other. An employee may thus assert a right to silence during internal proceedings and ask for such proceedings to be postponed pending the conclusion of the criminal trial. An employer is not, however, obliged to grant such a request.⁸⁵⁸ The rationale would be that workplace fairness demands greater promptness and it is inappropriate that criminal proceedings, over which the employer has no control, should delay the conclusion of internal process. It follows that the employee who asserts the right to silence in internal proceedings bears the risk of an adverse result. An employer should, however, alert the employee to the right to remain silent if criminal charges have been laid.

Embedded in this understanding is that the LRA's main demand with regard to fairness, which means that the employer affords the employee a fair and reasonable opportunity to speak against the allegations, oblivious of the inherent constitutional right to remain silent, which supersedes verbal defence and is the most relevant in this context. As mentioned in chapters one and two, the entailed flexibility principle is maintained through satisfying just one leg of the natural justice fairness principles—*audi alteram partem* and not the second leg *nemo iudex in propria causa sua*.

It can be argued that this approach is tantamount to haste criminal justice. If the employee's communication with the employer is in the positive, meaning that the employee's presentation amounts to a guilty plea to the crime at issue, the employer takes heed and makes a conclusion as to what sanction to impose. This determination may be influenced by the implied mitigation within the employee's presentation. Based on the employer investigative findings and the employee mitigation, the employer would then determine fair reason to dismiss.⁸⁵⁹

⁸⁵⁸ *Davis v Tip* NO 1996 1 SA 1152 (W); *Straub v SA Barrow* NO 2001 6 BLLR 679 (LC); *Fourie v Amatola Water Board* 2001 22 ILJ 694 (IC).

⁸⁵⁹ *National Union of Mineworkers & others v Durban Roodepoort Deep Ltd* 1987 8 ILJ 156 (IC) at 164-165.

Indicatively, employer's investigation serves a further purpose. It goes beyond a fact-finding mission. It extends to an assessment of competing versions of employer and employee. It can be argued that it has a dual purpose: that of determining the validity of the charges against the employee and that of determining an appropriate sanction in the context of the principle of 'fairness' within the limited LRA demands. Fundamentally that means that even if the "facts speak for themselves", and the conduct of the employee is in the circumstances so obvious as to appear to render a hearing unnecessary, an employee is still entitled to a hearing to give meaning to the "*audi alteram partem*" principle only.

Within the LRA, 'fair reason' envisages the disclosure of charges, employee and employer representation of relevant information, the consideration of evidence in support of employer allegation and in defence of such allegations by the employee, as well as evidence tendered by the employee in mitigation⁸⁶⁰ and given by the employer aggravation of the sentence. This process exposes a compressed approach to criminal justice, prone to the exclusion of essential section 35 protections in matters of a criminal law nature. As opposed to what criminal justice requires, the LRA enshrined fairness process, legitimises workplace decision originating from an objective and independent consideration of employer views, in a process that encourages dialogue and reflection within flexibility limitations. This outlook discourages the employer from engaging in wider constitutional fairness perspective, which ought to remind the employer that an employee

⁸⁶⁰ The significance of considering the personal circumstances of an employee or any evidence in mitigation has long been recognised. In *Moahlodi v East Rand Gold & Uranium Co Ltd* 1988 9 ILJ 597 (IC) at 605, the Industrial Court held that

"it is the duty of the person who presides over a disciplinary enquiry to obtain all relevant information about an employee's personal circumstances as well as his service record, and if need be to lean over backwards in an effort to find other extenuating circumstances in the employee's favour" and thereby to consider "alternative penalties appropriate to the circumstances of the case".

This approach is recognised in item 3(5) of Schedule 8.

criminal suspect enjoys rights and protections like other criminal suspects within entrenched section 35 constitutional fairness requirements.

3 2 5 Constitutional principles underlying investigations of suspects of criminal acts

Section 35 fairness requirements entrenched in the Constitution, bear their foundations within the historical foundations to the rule of law in South Africa. At the integral is the protection of well-established rights of criminal suspects as well as accused persons. Under South African law, the application of the principles protecting suspects in the course of criminal investigations is no longer doubted.⁸⁶¹ Apart from them being common law principles,⁸⁶² they are included in legislation⁸⁶³ dealing with evidence gathering,⁸⁶⁴ arrests and the prosecution of criminal trials.⁸⁶⁵ The apex is the constitutionally entrenched section 35(1) and 35(2) concerning the rights of suspects as well as the right to privacy.⁸⁶⁶

Both the right against self-incrimination and the right to remain silent found the rights of criminal suspects spelled out in the Constitution. They both have procedural and substantive law implications for criminals. 'The South African courts have characterized the silence principle as one 'integral to a fair [process]'⁸⁶⁷ and as a protection for the 'fundamental freedom and dignity'⁸⁶⁸ of an accused person.'⁸⁶⁹ In the event that the employer

⁸⁶¹See how this law used to be doubted before it was constitutionalised in South Africa by reading *Hiemstra v J* 1963 SALJ 187. Also see Theophilopoulos C *The right to silence and the privilege against self-incrimination* in Chapters 2 and 4 relating to the discussion on theories for and against these principles.

⁸⁶² *S v Daniëls* 1983 3 SA 275 (A); *S v Lwane* 1966 2 SA 433 (A); *R v Camane* 1925 AD 570 at 575.

⁸⁶³ Read sections 196(1)(a) and 203 of the Criminal Procedure Act 51 of 1977.

⁸⁶⁴ The admissibility of evidence gathered by unconstitutional means is always doubted and invokes the exercise of constitutional discretion from the judiciary. See section 35(5) of the Constitution.

⁸⁶⁵Sections 196(1)(a) and 203 of the Criminal Procedure Act 51 of 1977.

⁸⁶⁶ Section 4 of the South African Constitution.

⁸⁶⁷*Osman v Attorney-General Transvaal* 1998 (4) SA 1224 (CC) at 1229F per Madala J.

⁸⁶⁸ *Thebus v S* 2003 (10) BCLR 1100 at 1121 para 54 per Moseneke J.

⁸⁶⁹ See Theophilopoulos C 2006 SALJ 516.

investigation processes and hearing procedures fail to recognise the need for respecting employee criminal suspects rights entrenched in section 35 of the Constitution, including employee criminal suspects' right to remain silent, the employee has no alternatives offered under criminal justice procedure. The employee suspected of crime cannot appeal the employers' decision because such procedure is not offered within the labour law prescripts.⁸⁷⁰ The right against self-incrimination is centre for criminal persecutions justification.⁸⁷¹ It insists on cautious and principled measures in gathering evidence as well as presenting the evidence before the presiding person who would ultimately condemn the persecuted.⁸⁷²

The observance of this right binds both the persecutor and the persecuted. Contrary to this constitutional requirement, the employer armed with flexibility in its criminal investigations chooses not to observe this right, leaving the employee at the peril of losing the protection. Such protections including the right against self-incrimination are considered trivialities in labour law.⁸⁷³ In terms of the principle against self-incrimination, the authority is bound to respect and not compel any person to give self-incriminating evidence in criminal matters. It is this duty at law that binds criminal investigative teams to observe sections 203, 204 and 205.⁸⁷⁴ Section 203 entrenches the common law privilege of refusing to answer self-incriminating questions.

Based on sections 203 and 35, section 204 avails indemnity from prosecution for a suspect who later turns witness and gives self-incriminating evidence before court. Section 205 regulates the procedure to be followed when sourcing information from potential section 204 witnesses. Investigating police officers cannot, at will, extract self-

⁸⁷⁰ Evident to this is court jurisprudence concerning the proper recourse to this right. See *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC). Also read *Davis v Tip NO and Others* 1996(1) SA 1152 (W).

⁸⁷¹ Entrenched in section 35(3) of the Constitution.

⁸⁷² Refer to the interrelationship between sections 203, 204 and 205 of the Criminal Procedure Act 51 of 1977.

⁸⁷³ Grogan J *Dismissal* (2018) 419-420.

⁸⁷⁴ Of the Criminal Procedure Act 51 of 1977.

incriminating evidence from a suspect or witness without authorisation through a subpoena issued by the magistrate. A person who holds incriminating information and refuses to release it to the police will be forced to do so under oath by means of a subpoena. For the secured information to be used as evidence, where the informant refuses to take the stand in a criminal trial, section 204 becomes applicable.

In light of this procedure, it is clear that although there is some form of coercion when an individual is compelled to furnish incriminating information during an investigation, the nature of the privilege and the rights attached to it for protection against self-incrimination, mitigates the process to maintain fairness in this undertaking. To put it concisely, this privilege implies first, that information which from evidence against an individual's innocence must be independent of an individual coerced into participation and that second, an individual has the right to remain silent. Based on these rights, suspects can refuse to answer questions put to them for fear of self-incrimination.

These rights are made operative by the surrounding processes in the investigation of criminal cases. Information that investigators use to find a criminal charge, ought to be secured through sanctioned legal means. The use of search warrants, amongst others, is essential to secure information.⁸⁷⁵ Furthermore, the suspect ought to secure legal representation for his or her interrogation.⁸⁷⁶ As Theophilopoulos reiterates: '[t]he traditional silence principle is not a uniform one but a bundle of disparate and sometimes overlapping immunities which arise at different stages of the legal process.'⁸⁷⁷ In this way criminal investigations respect the due process of law.

⁸⁷⁵ Edwards G 1966 *JCLC* 133.

⁸⁷⁶ Edwards G 1966 *JCLC* 133.

⁸⁷⁷ See Theophilopoulos above note 869. Also read *R v Director of the Serious Fraud Office: Ex parte Smith* (1993) AC 1 at 30–1 per Lord Mustill. For an analytical description of the Anglo-American right to silence, see Theophilopoulos C 2003 *TSAR* 258 and Theophilopoulos C 2002 *SAJHR* 505.

A different scenario is portrayed in employer criminal investigations and hearings for dismissals based on criminal misconduct. The employer, although bearing an upper hand in the employment relationship, is not subjected to the formal investigations prescripts and engages in informal investigation processes. The employer, who has well placed technology and financial muscle, searches and finds any information regarding the employee. Without legal limitations like those that apply under the CPA sanctioning criminal investigations processes, the substantial employer criminal investigative procedures which are left uncontrolled, pose prejudice against the employee, suspected of a criminal misconduct.

Amongst others, the employer uses entrapments, such as tapping employee's communication without the employee's knowledge. Such *information would include emails, telephone communications, faxes and many others* that the employer can privately access. In so doing, the employer exposes the employee to self-incrimination and breaks the employee's rights to privacy and silence while the employer pays no regard to the lawful processes regarding criminal case related access to information.⁸⁷⁸

At worst is the employer's ability to directly force the employee to make submissions and concessions regarding the criminal allegations without being bound to exercise due diligence normally exercised in criminal investigations.⁸⁷⁹ This was the situation in the case of *Coetzer* discussed in chapter four. It would therefore not be wrong to refer to these employer criminal investigations as draconian. Their nature renders them disrespectful of the due process of law as compared to criminal investigations under the C P A.

Much like this scenario, is the decision by the Constitutional Court over a decade ago, in the case of *Thebus v S*.⁸⁸⁰ This case exemplifies that

⁸⁷⁸Grogan J *Dismissal* (2018) 419-420.

⁸⁷⁹ See *Coetzer* above note 160 para [24].

⁸⁸⁰ *Thebus v S* 2003 10 BCLR 1100 at 1128 para 81H per Goldstone and O'Regan JJ.

employer criminal investigations disrespect the delicate balance of the right to silence and the right against self-incrimination.⁸⁸¹ The current situation in South African labour law is unlike the situation in the United States of America where defined jurisprudence⁸⁸² surrounds the application of the right to silence, even in employer criminal investigations.

Further, the secured evidence ought not to strictly comply with principles of admissibility of evidence or follow presentation of evidence principles mandatory in the criminal justice system. Regardless of the ensued procedural faults, this evidence therefore directly becomes the basis of the employer's decision to dismiss the employee suspected of criminal misconducts.⁸⁸³ In the circumstances where the SAPS in terms of the CPA simultaneously perform investigations, there is a possibility that the employer obtained evidence may be an easy target.⁸⁸⁴

3 2 6 Evidentiary principles underlying criminal liability

The investigation stage discussed above, precedes the hearing stage. At the hearing, courts and tribunals are informed of the guilt of the transgressor through evidence. As far as criminal evidence is concerned, only relevant evidence would be admissible.⁸⁸⁵ Relevant evidence is evidence that speaks to the issues before courts.⁸⁸⁶ Thus each element of crime prescribed in the CPA schedules would have to be proven through evidence before an individual suspected and arraigned for a matter of a criminal law nature is held liable.⁸⁸⁷ The CPA prescribed that the standard of proof for

⁸⁸¹ *Thebus v S* 2003 10 BCLR 1100 at 1128 para 81H per Goldstone and O'Regan JJ.

⁸⁸² To name a few, see the reasoning in *Garrity v. New Jersey* 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lachance v. Erickson*, 118 S.Ct. 753, 139 L.Ed.2d 695; *Bryson v. United States*, 396 U.S. 64; *U.S. v. Wong*, 431 U.S. 174; *U.S. v. Dunnigan*, 507 U.S. 87; *Hale v. Henkel*, 201 U.S. 43; *Baxter v. Palmigiano*, 425 U.S. 308

⁸⁸³ See the case of *Minister of Police v RM M & Safety and Security Sectoral Bargaining Council* Case no: JR56/14 discussed in chapter one.

⁸⁸⁴ Grogan J *Dismissal* (2018) 419-420.

⁸⁸⁵ Schwikkard and Van der Merwe *Principles of Evidence* 50.

⁸⁸⁶ Schwikkard and Van der Merwe *Principles of Evidence* 50.

⁸⁸⁷ Schwikkard and Van der Merwe *Principles of Evidence* 613-614.

matters of a criminal law nature is proof beyond a reasonable doubt.⁸⁸⁸ Thus the criminal suspect cannot be held liable unless the allegation is proven beyond a reasonable doubt.⁸⁸⁹

Contrary to these requirements, employer criminal investigations and dismissal processes are based on flexibility and therefore do not observe formal principles. As a result, the employer is flexible to choose civil system of evidence. Evidence in labour law matters is measured on a balance of probabilities standard. In the end, the employee's guilt may be inferred even if all elements of crime are not sufficiently proven.⁸⁹⁰ If in turn the employee is subjected to a proper criminal investigation and trial, the outcome of the criminal trial would not influence the decision of the employer. Even if on a higher scale, beyond a reasonable doubt the employee is found not guilty of a crime, the employer would not reinstate the dismissed employee. Alternatively, the employee cannot submit the evidence and outcome of the Criminal Court before the employer disciplinary committee.⁸⁹¹

3 2 7 The rationale for the “beyond a reasonable doubt standard” of proof in criminal persecution

As opposed to employer criminal investigations founding criminal misconduct dismissals, proof requested in matters of a criminal law nature is proof beyond reasonable doubt and not proof on a balance of probabilities.⁸⁹² This does not mean proof beyond the slightest doubt.⁸⁹³

⁸⁸⁸ Schwikkard and Van der Merwe *Principles of Evidence* 613-614.

⁸⁸⁹ Schwikkard and Van der Merwe *Principles of Evidence* 613-614.

⁸⁹⁰ Grogan J *Dismissal* (2018) 419-420; *Avril* above note 6 at 838 and at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams (a Division of Foschini Retail Group (Pty) Ltd v Matji No & others* 2003 11 BLLR 1145(LC).

⁸⁹¹ Grogan J *Dismissal* (2018) 419-420; *Avril* above note 6 at 839 and 841; 2006 27 ILJ 1644 (LC) at 1653 and 1660; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams a Division of Foschini Retail Group (Pty) Ltd v Matji No & others* 2003 11 BLLR 1145(LC).

⁸⁹² Grogan J *Dismissal* (2018) 419-420; *Avril* above note 6 at 838 and at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams (a Division of Foschini Retail Group (Pty) Ltd v Matji No & others* 2003 11 BLLR 1145(LC).

⁸⁹³ Grogan J *Dismissal* (2018) 419-420; *Avril* above note 6 at 838 and at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams a Division of Foschini Retail Group (Pty) Ltd v Matji No & others* 2003 11 BLLR 1145(LC).

However, it is a requirement for a standard of proof higher than civil law standard of proof be used in employer criminal investigations.

The proof that founds guilt for civil labour matters is on a balance of probabilities, as opposed to beyond a reasonable doubt required in proving guilt under the criminal justice system. This means that criminal misconduct of theft is prosecuted on a lesser standard when employer disciplinary processes are made to run on employees who committed criminal misconduct, than in case where theft is prosecuted in terms of the criminal procedure.⁸⁹⁴ Employer criminal dismissal hearings' standard of proof cannot be equated to a *prima facie* proof required before a criminal suspect can answer to allegations.⁸⁹⁵ For this purpose, a higher standard of proof is required.⁸⁹⁶ This standard is attained when the accuser has managed to prove the accused's commission of all elements of crime.⁸⁹⁷

At the ultimate, before the accused is found to be guilty of theft, the accuser must give all evidence beyond a reasonable doubt.⁸⁹⁸ The accused must not be made to prove the accuser's case but to defend himself against the accuser's accusations.⁸⁹⁹ The main reason why criminal persecution demands this high standard of proof, is to guard against wrong persecution of innocent people.⁹⁰⁰ This rationale equates to the principle of

⁸⁹⁴Grogan J *Dismissal* (2018) 419-420; *Avril* above note 6 at 838 and at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams (a Division of Foschini Retail Group (Pty)Ltd v Matji No & others* 2003 11 BLLR 1145(LC).

⁸⁹⁵Grogan J *Dismissal* (2018) 419-420; *Avril* above note 6 at 838 and at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams (a Division of Foschini Retail Group (Pty)Ltd v Matji No & others* 2003 11 BLLR 1145 (LC).

⁸⁹⁶Grogan J *Dismissal* (2018) 419-420; *Avril* above note 6 at 838 and at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams a Division of Foschini Retail Group (Pty)Ltd v Matji No & others* 2003 11 BLLR 1145(LC).

⁸⁹⁷ Grogan J *Dismissal* (2018) 419-420.

⁸⁹⁸Grogan J *Dismissal* (2018) 419-420 *Avril* above note 6 at 838 and at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams a Division of Foschini Retail Group (Pty)Ltd v Matji No & others* 2003 11 BLLR 1145 (LC).

⁸⁹⁹ Grogan J *Dismissal* (2018) 419-420; *Avril* above note 6 at 839 and 841 at 1653 and 1660; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams (a Division of Foschini Retail Group (Pty) Ltd v Matji No & others* 2003 11 BLLR 1145 (LC).

⁹⁰⁰ Grogan J *Dismissal* (2018) 419-420; *Avril* above note 6 at 838 and at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 1999 20 ILJ 2679 (LC); *Markhams (a Division of Foschini Retail Group (Pty)Ltd v Matji No & others* 2003 11 BLLR 1145 (LC).

proportionality explained in chapter two.⁹⁰¹ As indicated before, proportionality cannot be honoured where a criminal perpetrator is made to make a case against itself like it is in the case of employer criminal persecution where the employee is supposed to answer to its cause without regard to the principles of fairness, in particular the principle against self-incrimination,⁹⁰² implored in matters of a criminal law nature. Due to its roots in natural justice principles entailing fairness in matters of a criminal law nature, proportionality negates self-incrimination.

3 3 The nature of the employer's right to dismiss employees who committed criminal misconducts

During the era of the LRA 28 of 1956, the previous labour law legislation, the Industrial Court took a turn from strict observation of natural justice principles which entailed fairness even in matters of a criminal law nature.⁹⁰³ It maintained the view that whilst the principle of a fair procedure was innately linked to the determination of a fair decision, the rules of natural justice could not be “applied mechanically or with the trappings of strict legalism.”⁹⁰⁴ It is submitted that the ensued approach emanates from the perspective that workplace governance, is by its nature characterised by an inherent *flexibility*. As seen in the previous chapter two, the essence of flexibility in workplace related matters amounts to the understanding that the daily direct interactions between employees and employers requires quick, efficient, fair and effective dispute resolution procedures. Edwin Cameron⁹⁰⁵ explains the need for flexibility as follows:

⁹⁰¹ Chapter two part 2 2 4 1 dealing with the theory of proportionality and its extent of application in criminal misconduct discipline.

⁹⁰² Grogan J *Dismissal* (2018) 419-420.

⁹⁰³ *Avril* above note 6 at 838 and at 1652; *Potgietersrus Platinum Ltd v CCMA & Others* 2006 9 BLLR 833 (LC) 838; 2006 27 ILJ 1644 (LC) at 1652; *Markhams a Division of Foschini Retail Group (Pty)Ltd v Matji No & others* 2003 11 BLLR 1145(LC).

⁹⁰⁴ *NAAWU v Pretoria Precision Castings (Pty) Ltd* 1985 6 ILJ 369 (IC).

⁹⁰⁴ Cameron E 1986 ILJ 185-186.

⁹⁰⁵ Cameron E 1986 ILJ 185 -186.

Employers and employment conditions vary hugely in their circumstances, and to oblige a one-man trader to comply with the same procedures and formalities which may reasonably be expected from a mining operation employing tens of thousands would not only be impractical and unnecessary, it would also be unfair. Just as the principles of natural justice – upon which the Industrial Court has increasingly begun to draw for its formulations - are flexible and have no precisely fixed content, so too the exact requirements of the right to a hearing before dismissal must depend on various considerations.

But ‘flexibility’, as Cameron points out⁹⁰⁶, although appropriate in the context of industrial relations, *“has its limits and these seem to lie along the boundaries of essential fairness.”*⁹⁰⁷ There is a possibility of differing arguments on this approach. Whilst it can be argued that there is merit in this approach both from a practical and conceptual approach, there is also a possibility of a differing view.

A positive perspective may entail that from a practical perspective, it allows an employer, with reference to the context in which it finds itself, to ensure that a fair process is implemented without all the trappings of formality or the strict application of the rules of evidence. From a labour law conceptual perspective, the maintained jurisprudential principle of procedural fairness considers the nature of employment relations. By the same token, it also recognises the adaptability of the principle to suite the occasion and yet maintains the benefit for all participants to enjoy its essential content.

However, if the same understanding that excludes formalities inscribing proportionality is adopted, from a criminal justice perspective there emanates injustice. The employer who ventures into administering criminal justice is expected to exercise cautions relevant in attaining criminal justice in order to satisfy fairness. Fairness from a criminal justice perspective entails the need to observe both principles of natural justice. At the centre

⁹⁰⁶Cameron E 1986 *ILJ* 185, at 187.

⁹⁰⁷Cameron E 1986 *ILJ* 185 -186.

of criminal justice is the need to satisfy proportionality in dealing with matters of a criminal law nature.

The question is, does the LRA support the notion of ‘flexibility’ and if so, to what extent? Section 188 imposes a statutory right to a fair procedure and expresses nothing more, apart from a reference to Schedule 8. To that extent, the LRA upholds the idea of flexibility beyond a necessary extent and overrides proportionality necessary for criminal justice. Thereafter, Schedule 8 stipulates a range of factors that should be considered to determine whether a fair hearing has been afforded. To that extent, and even in the context that Schedule 8 is a ‘guideline’, it establishes the minimum content of that right and effectively limits the extent of the flexibility, but not to the extent that the mandatory rationales in punishing criminal suspects are satisfied. This issue is explored further in the context of the examination of the constituent parts of the right, below.

3 3 1 Content of the right to a fair procedure within the LRA

Procedural fairness in terms of the LRA is dealt with in item 4 of the Code. The content of this right was initially articulated by the Industrial Court in the context of the previous Labour Relations Act 28 of 1956 and its “unfair labour practice” jurisdiction.⁹⁰⁸ Bulbulia in *Mahlangu*⁹⁰⁹ indicated that a procedure which aims to promote the principle of fairness must include the general right to challenge “*any statements detrimental to his credibility and integrity*”, and specific rights, such as the right: 1) to be informed of the nature of the charges together with relevant particulars of the charge; 2) to a ‘timeous’ hearing; 3) to adequate notice of the hearing; 4) to representation; 5) to call witnesses; 6) to an interpreter; 7) to a finding and a sanction, if any, and reasons; 8) to have the previous record considered; and the right to an internal appeal.⁹¹⁰ The right against self-incrimination is

⁹⁰⁸ Read *Mahlangu v Cim Deltak, Gallant v Cim Deltak* 1986 7 ILJ 346 IC 356-567.

⁹⁰⁹ 1986 7 ILJ 346 (IC).

⁹¹⁰ *Mahlangu v Cim Deltak, Gallant v Cim Deltak* 1986 7 ILJ 346 IC 356-567.

however excluded. It may be argued that it is impliedly inferred although not binding to the employer. The employee may invoke it at its own prejudice. The employer may continue with the process without the employee's involvement.⁹¹¹

These requirements are now codified. In contrast however, the requirements of a fair hearing previously referred to as 'rights'⁹¹² are stated in 'directory' terms⁹¹³ rather than 'peremptory' ones in the Code. This is not surprising in the context that the Code provides guidelines only and does not give rise to rights in and of itself.⁹¹⁴ Item 4 restates the general principle that the employee should be allowed the opportunity to state a case in response to the allegations against him. In order to give meaning to this principle, Schedule 8, in addition, specifies the broad principles of a fair hearing⁹¹⁵ in the following terms:

The employer should 'normally' investigate to determine whether there are grounds for dismissal. This does not need to be a formal enquiry;

The employee should be informed of the allegations using a form and language that the employee can reasonably understand;

The employee should be entitled to a reasonable time to prepare a response, and to assistance from a trade union representative or fellow employee;

After the enquiry, the employee should be furnished with written notification of the decision and, if applicable, the reasons for the dismissal;

If dismissed, the employee should be reminded of any rights to refer the matter to a council with jurisdiction or to the CCMA, or to any

⁹¹¹ See Grogan J *Dismissal* (2018) 213.

⁹¹² *Mahlangu v Cim Deltak, Gallant v Cim Deltak* 1986 7 ILJ 346 IC at 357–358.

⁹¹³ Item 4 uses the term 'should' rather than 'must'. Something of a difference, in *Mahlangu v Cim Deltak, Gallant v Cim Deltak* 1986 7 ILJ 346 IC at 357–358 Bulbulia M refers to these as rights.

⁹¹⁴ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & another* 1997 10 BLLR 1320 (LC); 1998 19 ILJ 635 (LC) 641G. Also read Grogan J *Dismissal* (2014) 265.

⁹¹⁵ Item 4 of Schedule 8. Also read, *Malelane Toyota v CCMA* 1999 6 BLLR 555 (LC).

*dispute resolution procedures established in terms of a collective agreement.*⁹¹⁶

The labour law disciplinary process unfolds in accordance with section 23 of the Constitution read with sections 185 and of the LRA. Section 23 of the Constitution entrenches the right to fair labour practices. This right covers several terrains of labour law including individual dismissal law. Thus, the right to fair dismissal is a constitutional right, entitling employees to fair conduct from employers. In effect, it ties down employer conduct to established constitutional fairness. According to De Waal and Currie⁹¹⁷ under normal circumstances, Bills of Rights are intended to regulate legislation and public power and not private dealings. Based on the requirement in section 8 of the Constitution, read with section 23(1), it is trite to argue that unique to South African constitutional perspective of law, private dealings are also subjected to observing the Bill of Rights.

In consonance with Cheadle's⁹¹⁸ observation that South African Constitution has introduced a *sui generis* right entrenching the right to fair labour practice,⁹¹⁹ it can be argued that this right is an example, that from a South African constitutional law perspective, the Bill of Rights matter in every aspect affecting individual rights.⁹²⁰

Another indication regarding this right is that, the employer and employee dealings which under common law were considered issues of purely private concern have been subjected to constitutional rights scrutiny. It is argued

⁹¹⁶ Item 4 of Schedule 8.

⁹¹⁷ Currie I & De Waal J *The Bill of Rights Handbook* at 501.

⁹¹⁸ Cameron E, Cheadle H and Thompson C *The New Labour Relations Act*: 144-145.

⁹¹⁹ Currie I & De Waal J *The Bill of Rights Handbook* at 501.

⁹²⁰ This is not as such novel, taking into regard other common law countries perspectives. For example, American perspective on matters of a criminal law nature where employees are perpetrators is that the Fifth Amendment clause is observed. This clause emphasises the observance of proportionality principles similar to principles of fairness entrenched in section 35 of the constitution.

that this is in effect the constitutionally entrenched effort to marry public and private law which is a move accustomed with progressive systems.⁹²¹

It is submitted, further, that the rationale behind this is seen as an attempt to expand the individual employment relations from a narrow common law perspective so as to do away with the extent of inequalities between the employer and employee embedded in the nature of a private contract of employment. As shown earlier the employment contract embeds in its foundations the negative and imbalanced relationship of master and servant. Worldwide, this relationship has been mitigated through the observation of individual rights.⁹²²

The need for the same attempt from a South African constitutional view is implied in Ngcobo J's decision in the case of *National Education Health and Allied Workers Union v University of Cape Town*.⁹²³ Ngcobo J even though seized with an appeal on the interpretation and application of the LRA with reference to the right of fair labour practice, examined section 23(1) of the Constitution.⁹²⁴

He exposed the apprehended possibility of misinterpreting this right but recognised the relevance of both domestic and international experience in unpacking the content of the concept of fair labour practice. He held that fair labour practice is incapable of a precise definition due to the ensuing

⁹²¹Regarding the negative aspects of the divide between public and private law read literature on parallel investigations. See Coffee J C 1991 *Boston University Law Review* 193 at 194 where he acknowledges the nature of criminal law. Regarding the possibility of prejudicial processes read Cheh M M *The Hastings Law Journal* Vol 42 1325. Also read Basdeo V 2013 *African Journal of International and Comparative Law* 303-326; McCastlain C J and Schooner L S 1986 *Public Contract Law Journal* 418-445. ; Gonzalez L G Connelly B G and Eliopoulos E 1993 *American Criminal Law Review* 1179-1220 at 1179; Hasset M J 1979 *Washington and Lee Law Review* 1049; Eckers S R 1998 *Hofstra Law Review* 109.

⁹²² See *Murphy v Waterfront Commission of New York Harbor* 378 U.S. 52 (1964). Followed in *Malloy v. Hogan*, 378 U.S. 1 (1964); *Spevack v. Klein*, 385 U.S. 511 (1967) and *Garrity v. New Jersey*, 385 U.S. 493 (1967).

⁹²³ 2003 3 SA 1 (CC) paras 33-35.

⁹²⁴ *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) paras 33-35.

tension between the interests of the employer and employee which it seeks to address.⁹²⁵

He advised that a proper extrapolation of this right may be guided by the explanations in human rights instruments such as Conventions and Recommendations of the International Labour Organisation and other comparable foreign instruments such as European Social Charter.⁹²⁶ He observed that the right to fair labour practice seeks to maintain a balance of employer, employee interests.⁹²⁷ His observation does not expose an untoward approach but an approach that is human rights-based. It is opposed to the employer interest-centred approach interpretation. It advocates for the mitigation of both employer and employee rights.

It is submitted that the need to balance the interests between employer and employee under the constitutional era invariably considers individual rights. On that basis, it is not constitutional fairness to overemphasise employer interests at the expense of employee constitutional rights as portrayed in a system that promotes flexibility and negates proportionality as sought in the current labour law fair dismissal jurisprudence.⁹²⁸

In the context of this thesis, the chickens come to roost in the case where the interpretation of labour law fairness is sought from sacrificing entrenched fair rights like in the currently scrutinised employer criminal investigations powers and disciplinary processes on which the employer relies for investigating and hearing matters of employee criminal misconduct.

Ironically, the jurisprudential interpretation of labour law fairness portrays that fairness excludes proportionality and promotes flexibility at the expense

⁹²⁵ *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) paras 33-35.

⁹²⁶ *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) paras 33-35.

⁹²⁷ *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) paras 33-35.

⁹²⁸ du Toit et al *Labour Relations Law* at 23-28 and "Explanatory Memorandum to the Draft Labour Relations Bill, 1995" (1995) 16 *ILJ* 278.

of individual rights.⁹²⁹ Fairness enquiry in South African labour law bears a jurisprudence of ages even prior the Constitution.⁹³⁰ The reasoning of courts in labour matters prior the Constitution have played some major importance towards the current understanding.⁹³¹ In *Media Workers Association of South Africa and Others v Press Corporation or South Africa*⁹³² the Appellate Division⁹³³ held that a decision on a question of fairness is “the passing of a *moral judgement*”⁹³⁴ on a combination of finding facts and opinions.”⁹³⁵ It went further to hold that “a fairness determination is a judgement made by a Court in light of all relevant considerations. It does not involve a choice between permissible alternatives.”⁹³⁶

Consequent to this decision, the Appellate Division⁹³⁷ having considered the implications of moral or value judgement, determined an appropriate sanction for misconduct, found favour in the words of Cameron, Cheadle and Thompson⁹³⁸ when describing fair reason, to wit that,

⁹²⁹ Including the following cases *Carephone (Pty) Ltd v Marcus NO and others* 1998 11 BLLR 1093 (LAC); *Shoprite Checkers (Pty) Ltd v Ramdaw NO and others* 2001 9 BLLR 1011 (LAC); *Sidumo* above note 180. (CC); *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others* [2009] 11 BLLR 1128 (LC); *Herholdt v Nedbank Ltd* 2012 9 BLLR 857 (LAC); *Herholdt v Nedbank Ltd* 2013 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd; (Kloof Gold Mine) v CCMA and others* 2014 1 BLLR 20 (LAC).

⁹³⁰ See for example, *Moahlodi v East Rand Gold & Uranium Co Ltd* 1988 9 ILJ 597 (IC) at 605.

⁹³¹ per Bulbulia AM, J in *Mahlangu v Cim Deltak, Gallant v Cim Deltak* (1986) 7 ILJ 346 IC at 357-358. As well, see *Davis v Tip No* 1996 1 SA 1152 (W) 1157F-G and 1158 G-H. Applied from labour law perspective in Grogan J *Workplace Law* (2017) 256; From a civil procedure perspective in Cilliers A C, Herbstain J, Loots C; Nel HC *The civil practice* at page 757 and from a human rights perspective in Currie I & De Waal J *The Bill of Rights Handbook* at 745.

⁹³² *Media Workers Association of South Africa and Others v Press Corporation or South Africa* 1992 4 SA 791 (A).

⁹³³ The Appellate Division made its decision in the context of the previous Labour Relations Act 28 of 1956. It was deciding on unfair labour practice.

⁹³⁴ My emphasis.

⁹³⁵ *Media Workers Association of South Africa and Others v Press Corporation or South Africa* 1992 4 SA 791 (A) page 798 at para 25 per Perskor judgement.

⁹³⁶ *Media Workers Association of South Africa and Others v Press Corporation or South Africa* 1992 4 SA 791 (A) at page 800 para 31 per Grosskopf JA.

⁹³⁷ *National Union of Mineworkers & others v Free State Consolidated Gold Mines (Operations) Ltd* 1996 1 SA 422 (A) at 446G-I 1995 16 ILJ 1371 (A)] .

⁹³⁸ Cameron E, Cheadle H and Thompson C *The New Labour Relations Act*: at 144-145.

*A fair reason in the context of disciplinary action is an act of misconduct sufficiently grave as to justify the permanent termination of the relationship.... Fairness is a broad concept in any context, and especially in the present. It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case including the action with which the employee is charged are considered.*⁹³⁹

Consistent with this interpretation is the Constitutional Court's approach in the *Nehawu*⁹⁴⁰ matter where Ngcobo J held that "...what is fair depends upon the circumstances of a particular case and essentially involves a value judgement."⁹⁴¹

The case of *BMD Knitting Mills (Pty) Ltd v South African Clothing & Textile Workers Union*⁹⁴² decided within the constitutional era defined the concept of fairness as follows:

*The word 'fair' introduces a comparator that is a reason which must be fair to both parties affected by the decision. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the employer is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.*⁹⁴³

The case of *Sidumo*⁹⁴⁴ decided by the Constitutional Court⁹⁴⁵ rejected the principle of employer reasonableness. This principle relates to a test whether a reasonable employer in the same employment situation as the

⁹³⁹Cameron E, Cheadle H and Thompson C *The New Labour Relations Act*: at 144-145.

⁹⁴⁰*National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 3 SA 1 (CC); 2003 2 BCLR 154 (CC) (NEHAWU) Para 33.

⁹⁴¹*National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 3 SA 1 (CC); 2003 2 BCLR 154 (CC) (NEHAWU) Para 33.

⁹⁴²2001 22 ILJ 2264 (LAC).

⁹⁴³The court was dealing with dismissal for operational requirements.

⁹⁴⁴*Sidumo* above note 180 paras 78-79.

⁹⁴⁵*Sidumo* above note 180 paras 78-79 .

current employer in dispute would also have dealt with the matter or issue the same way as the current employer. The court regarded it to be imbalanced. It considered the test as based on the perceptions and values of the employer side of the dispute and therefore placing emphasis on the interests of employers more than those of workers. If sustained, it would be parallel to possibly an employer objectionable test if applied vice versa as reasonable employee test.

The Constitutional Court therefore set aside the previous decision that supported the employer reasonableness. Basing its decision from reading relevant provisions⁹⁴⁶ from the LRA, it clarified the powers of the commissioners in determining the fairness of a dismissal. According to this judgment, commissioners and arbitrators are impartial adjudicators who must determine whether the dismissal was fair in an impartial manner. Accordingly, the court decided it is the commissioner's sense of fairness that must prevail and not the employer's view.⁹⁴⁷ The Constitutional Court gave a guideline that in determining fairness of a dismissal certain requirements are mandatory, including;

- the totality of the circumstances of the matter;
- whether what the employer did was fair;
- the importance of the rule that the employee breached;
- the reason the employer imposed the sanction of dismissal;
- the basis of the employee's challenge to the dismissal;
- the harm caused by the employee's conduct;
- whether additional training and instruction may result in the employee not repeating the misconduct;
- the effect of dismissal on the employee;
- the long service record of the employee.⁹⁴⁸

⁹⁴⁶ *Sidumo* above note 180 paras 78-79.

⁹⁴⁷ *Sidumo* above note 180 para 75.

⁹⁴⁸ *Sidumo* above note 180 paras 78-79.

As decided by the court⁹⁴⁹ the mentioned aspects, although mandatory considerations, are not determinative. The employer has a flexible way of complying with them. The commissioners must weigh all deciphered factors in order to reach a fair determination in the circumstances of matters before them. Commissioners ought to consider whether employers had managed to establish the factual basis or a fair reason for dismissing the employee. This means, that viewed objectively, the reason for the dismissal must be an act of grave or serious misconduct which warrants the permanent cessation of the employment relation or renders the continuation of the employment relationship intolerable, in the context of the balancing of all the factors identified by the Constitutional Court.⁹⁵⁰

By way of example, where the conduct of the employee is found to be unacceptable, but the sanction of dismissal is in all the circumstances not a fair sanction,⁹⁵¹ the dismissal will be substantively unfair. Similarly, where the conduct of the employee is deemed unacceptable and the sanction of dismissal is in all the circumstances a fair sanction, the dismissal will be substantively fair.

3 4 Conclusion

This chapter has investigated the South African jurisprudential expression of the nature of labour law fairness and has compared it to the nature of entrenched constitutional fairness principles dealing with matters of a criminal law nature.

In anticipation, a study of fairness processes in South African labour law viewed in the light of proportionality and flexibility theories extrapolated in chapter two was eminent. The chapter has shown that while processes of fairness that are established⁹⁵² in dealing with matters of a criminal law nature largely rely on the theory of proportionality, from the labour law

⁹⁴⁹ *Sidumo* above note 180 paras 78-79.

⁹⁵⁰ *Sidumo* above note 180 paras 78-79.

⁹⁵¹ *Sidumo* above note 180 paras 78-79.

⁹⁵² Found in the CPA and section 35 of the Constitution.

disciplinary perspective for matters of a criminal misconduct, processes of fairness greatly lean towards the theory of flexibility.

What was deciphered from the above analysis was that the central objective of the current perspective of labour law fairness is to create an even balance between the competing interests of the employer and the employee so that both are guaranteed the right to fair labour practices. It was however sad to note that regarding dismissals emanating from criminal misconduct investigations the reverse is achieved. As mentioned in chapter two, an overemphasis on employer flexibility as opposed to proportionality accustomed in matters of a criminal law nature waters down the justified fairness for dealing with employee criminal suspects.

It was indicated in chapter two that the nature of proportionality emphasised in the labour law jurisprudence is compromised because it is founded on informal proceedings. These informal proceedings were found not to be observing both principles of natural justice explained in chapters one and two. They were also found to ignore principles of fairness for criminal suspects entrenched in section 35 of the Constitution.

This chapter has found that the basis for labour law fairness as far as employer investigations and disciplinary hearings are concerned is weak and unjustified. The chapter deems such a basis to be devoid of conscious regard to the Bill of Rights embracing constitutional justification of fairness. Labour law fairness was found unable to afford employee criminal suspects constitutional rights. It was found to create vast inequalities between criminal suspects within the wide constitutional fairness perspective.

Consequently, in the light of constitutionally entrenched fairness principles for suspects of crime, the employers' investigations pertaining to employees that are suspected of criminal misconduct and their subsequent disciplinary hearings for dismissal are viewed to be constitutionally unfair.

Through the exposition of what transpires when dealing with criminal misconduct suspects within the labour law parameters *against* the established constitutional requirements of fairness associated with criminal

suspects, the employer investigations and hearings render noticeably unconstitutional consequences.

The next chapter shows how the determination of fairness discussed in this chapter unfolds in matters where employees were suspected of criminal misconduct. Chapter four in effect shows the unconstitutional consequences of flexibility based criminal justice as opposed to proportionality based criminal justice. It is an illustration of how unfair and constitutionally unjustified it is to refuse employee criminal suspects of their right to fairness as suspects of crime.

Chapter Four

The LRA disciplinary hearing processes for dismissal of employees who committed criminal misconducts and consequent challenges

4 Introduction

The previous chapter looked at the jurisprudential expression of the nature of labour law fairness. It interlinked it to the nature of constitutional fairness principles entrenched in section 35,⁹⁵³ in the context of dealing with employment disciplinary matters of a criminal law nature. It studied the nature of labour law fairness entrenched in section 23(1) in the light of constitutional fairness principles as understood from sections 33⁹⁵⁴ and 35⁹⁵⁵ of the Constitution.

Chapter three exposed the inequalities arising when dealing with criminal misconduct suspects within the labour law jurisprudential parameters. It has shown that labour law disciplinary processes for employee criminal misconduct suspects are *against* the established section 35 constitutional requirements of fairness associated with criminal suspects. As anticipated, the study of fairness processes in labour law viewed in the light of proportionality and flexibility became eminent.

The chapter exposed that while criminal justice fairness relies greatly on the principle of proportionality, the labour law disciplinary perspective on fairness leans towards the principle of flexibility. From these revelations, it was exposed that in the light of constitutionally entrenched fairness principles for suspects of crime, employers' criminal investigations pertaining to employees that are suspected of criminal misconducts and their subsequent disciplinary hearings for dismissal, border on constitutional unfairness. The conclusion from chapter three exposures is that, the

⁹⁵³ Section 35 of the Constitution read with the CPA.

⁹⁵⁴ Section 33 entrenches administrative fairness and is the umbrella provision for all administrative fairness including LRA related fairness. See *Sidumo* above note 180 para 138. Read chapter 3 at part 3 1 dealing with the nature of the right to fair dismissal on the basis of a criminal misconduct.

⁹⁵⁵ Section 35 fairness is intended for a criminal justice perspective.

employer criminal investigations and subsequent disciplinary hearings do not express constitutional fairness entailed in matters of a criminal law nature because they bear inequalities between criminal suspects.

Against the chapter three background, this chapter exposes that the adoption of the principle of implied breach of trust between employer and employee emanating from common law⁹⁵⁶ and now encapsulated in jurisprudential underpinnings of dismissal hearing processes promotes the idea that the employer has flexibility in determining disciplinary hearing processes. Within this condition, the LRA disciplinary hearing processes for the dismissal of employees who committed criminal misconducts, even though dealing with matters of criminal law nature, do not observe criminal procedure based on section 35 entrenched fairness principles.

While employers feel not bound by the prescripts of criminal justice, they lose sight of the holistic application of constitutional demands.⁹⁵⁷ Therefore there is a blatant disregard for the relevance of section 35 of the constitution regarding the treatment of employees who committed criminal misconduct as criminal suspects.

Due to this, the extent of employer criminal investigations and subsequent disciplinary hearing processes are informal, and disregard formal processes proscribed in the CPA. This chapter ultimately exposes that the informal employer disciplinary hearing flaunts the essentialities of proportionality mandated in matters of criminal law nature.⁹⁵⁸ This circumstance culminates in multiple injustices for employees subjected to employer criminal investigations and their subsequent disciplinary hearings.

⁹⁵⁶ Discussed in chapter two at part 2 2 4 2 dealing with the theory of flexibility and its extent in criminal misconducts discipline.

⁹⁵⁷ Entrenched in section 35 of the constitution.

⁹⁵⁸ Explained in chapter two at part 2 2 4 1 dealing with the theory of proportionality and its extent of application in criminal misconduct discipline.

4 1 The determination of dismissal sanction on the basis of a criminal misconduct

An employee who has been investigated for a criminal misconduct faces a penalty arising out of a disciplinary hearing. The hearing is eminent so that the employer determines whether dismissal would indeed be an appropriate sanction. In terms of Item 3(5) of the LRA Code, the employer would make consideration based on factors tabled in the hearing. Since the hearing is informal, criminal procedure is not followed and rules of evidence are applied casually,⁹⁵⁹ with undue premium placed upon the balance of probability.

The circumstances that determine the resulting sanction of dismissal, instead of adhering to standard rules established under criminal justice processes, turn out in variety and dependent on the uniqueness of each case in question. Hence instead of determining whether the guilt of the employee has been proven beyond reasonable doubt, the presiding officer considers merely on a balance of probabilities only whether the allegation that the employee is a criminal has broken down the trust relationship between the employer and employee. As seen in Chapters one, two and three, the employers' discretion plays a vital role in determining if the guilt of an employee may have adverse impact on the employer and employee relationship.

The employer can then label the employee a thief and dismiss the employee if the employer feels that the relationship has broken down.⁹⁶⁰ Certain factors, either to a mitigating or an aggravating effect also play a role. These include factors such as the length of service that the employee provided

⁹⁵⁹ Consider, the case of *Minister of Police v RM M & Safety and Security Sectoral Bargaining Council* Case no: JR56/14 discussed below in para 4 3.

⁹⁶⁰ In that sense, two employees who have committed a similar criminal misconduct may be treated differently. One may be dismissed while the other is retained. See the cases of *Anglo-American Farms t/a Boschendal Restaurant v Komwayo*, 1992 13 ILJ 573 (LAC) and *Donald Baphuthi v The CCMA and Others*, Unreported case no J1901/99, Labour Court 1999. Referred to in chapter two part 2 2 4 1 dealing with the theory of proportionality and its extent of application in criminal misconduct discipline.

before the alleged criminal misconduct.⁹⁶¹ It would be divulged if the employee had had previous disciplinary records. The employee's personal circumstances also matter, coupled with the nature of the job the employee was engaged in, the conditions surrounding the infraction and the degree of damage, meted out by the committed criminal misconduct to the employer and employee relationship.

The employer is mandated to hold only one enquiry. In accordance with section 188(1)(a) the single enquiry is supposed to determine whether the sanction of dismissal is fair considering all the circumstances of the case. The determination of fairness in this account follows the approach extrapolated in chapter three, namely that which observes the *audi alterum partem* rule and against the *judex in propria sua causa* rule. Having taken the decision to dismiss, the employer remains with the duty to show that both the reason for dismissal and the procedure assumed were fair within labour law standards explained in chapter three.⁹⁶²

4 2 The process of discipline for suspects of a criminal misconduct

In chapters one, two and three, the basis for employer criminal investigation has been explained as the initial step towards disciplining an employee suspected of criminal behaviour.⁹⁶³ As seen earlier, this serves as a foundational step to the process of discipline. Labour law disciplinary process unfolds in accordance to section 23 of the Constitution read with sections 185 and of the LRA. Chapter three exposed that a comprehensive understanding of what fair and unfair dismissals entail can be devised from reading Chapter VIII of the LRA and Schedule 8.

⁹⁶¹ See *Anglo American Farms t/a Boschendal Restaurant v Komwayo*, 1992 13 ILJ 573 LAC and *Donald Baphuthi v The CCMA and Others*, Unreported case no J1901/99, Labour Court 1999. Refer to chapter two part 2 2 4 1 dealing with the theory of proportionality and its extent of application in criminal misconduct discipline.

⁹⁶² Within the *Sidumo* guidelines. See chapter three part 3 1 discussing the nature of the right to fair dismissal on the basis of a criminal misconduct. Fairness in this respect relates to the substantive and the procedural fairness. *Sidumo* above note 180 paras 78-79 .

⁹⁶³ Within the LRA provisions in Chapter VIII read with Schedule 8. In particular item 4(1) of Schedule 8.

Chapter VIII of the LRA is composed of sections 185, 186 and 187 and 188.⁹⁶⁴ These sections make a distinction between fair reason and fair procedure. Further, they serve as guidelines on how an aggrieved employee can claim relief in the case where an unfair dismissal is insinuated. Furthermore, they provide *remedies* where any are available to a dismissed employee. In short, they contextualise the relationship between the employer's reason for dismissing an employee and the process that the employer must follow in dismissing the employee. Thus, in effect, these sections prescribe the general approach to the disciplinary process without specifically outlining what fairness entails.

The basic requirement is that employers ought to demonstrate both procedural and substantive fairness when disciplining employees for misconduct. There is no specific inference in these sections to the formal way of disciplining an employee. The ensued jurisprudence has leaned so much towards the avoidance of formal processes risking prejudices avoided within formal procedural processes. Such an approach means that an employer has unlimited discretion on how to run a disciplinary process. The leading Labour Court case of *Avril*⁹⁶⁵ emphasised the need for the lack of formal procedure in employer disciplinary process. It held from labour law jurisprudential perspective that an internal disciplinary process shies away from being legalistic and that it adopts minimal procedural formalities. It does not differentiate between matters of criminal law nature and purely civil matters.⁹⁶⁶

Basically, what *Avril*⁹⁶⁷ argued for, was that the exclusion of formalities in the initial employer dismissal processes is not prejudicial because the ensued external arbitration process at the CCMA stands as a primary forum in determining disciplinary dismissal dispute.⁹⁶⁸ The CCMA therefore

⁹⁶⁴ See chapter three, para 3.1 on the nature of the right to fair dismissal on the basis of a criminal misconduct.

⁹⁶⁵ 2006 27 ILJ 1644 (LC) 44.

⁹⁶⁶ *Avril* above note 6 at 838 and at 1652.

⁹⁶⁷ *Avril* above note 6 at 838 and at 1652.

⁹⁶⁸ *Avril* above note 6 at 838 and at 1652.

engages in more formal processes to mitigate possible prejudice. It was the court's observation that there is no benefit to either the employee or the employer to duplicate the formal hearing process, even if the result is the dismissal of the employee.⁹⁶⁹ This lack of formalities on employer investigations applies across board on labour matters including matters where employees are suspected of criminal misconduct.

This reasoning can be criticised as not apprehending the possibility of prejudice that an informal approach to the investigation of an employee's criminal guilt would pose. If an employer investigates an employee suspected of criminal misconducts but does not follow the normal precautions that are formalised in the investigation of crime, there is a blatant ignorance of fairness requirements regarding criminal suspects.⁹⁷⁰

This thesis opposes the capacity of the CCMA to function as the 'primary forum' to determine fair procedure regarding the investigation of criminal misconducts. In effect in these cases the CCMA would only be confined to reviewing what the employer would have already done while engaging in informal processes.

Due to the jurisprudential limitations on the CCMA, namely that it has to decide matters within the prescripts of the LRA and nothing more or less, it is impracticable even if it were possible to insist at that stage that a formal procedure encompassing fairness which observes proportionality principles as justice in matters of criminal law nature would demand, should resume at that later stage post-dismissal.

In addition to the imposed limitations at the stage of review the CCMA would be seeking to unscramble the scrambled egg. Many of the precautions observed within proportionality perspectives would have been overstepped.⁹⁷¹

⁹⁶⁹ *Avril* above note 6 at 838 and at 1652.

⁹⁷⁰ In accordance with fairness principles in section 35 of the Constitution.

⁹⁷¹ Refer to chapter two part 2 2 4 1 dealing with the theory of proportionality and its extent of application in criminal misconduct discipline.

The ignorance of these processes needed in investigating acts of a criminal nature from the onset cannot be remedied on review and within the prescribed CCMA remedies. This situation leaves the employee without remedies as far as the insistence on the observance of fairness principles, which are constitutionally entrenched for the treatment of criminal suspects is concerned. Amid these complexities where employers are not bound to observe entailed rights in disciplining employees who have committed a criminal misconduct, employee criminal suspects are left to fight a losing battle. As it was decided in the case of *Davis v Tip No.*⁹⁷²

*...civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings....The preservation of the applicant's rights lies entirely in his own hands, and there is no such element of compulsion. What the employee seeks to be protected against is the consequence of the choices he is being called upon to make.... The applicant may well be required to choose between incriminating himself or losing his employment. If he loses his employment, that becomes a consequence of the choice he has made but not a penalty for doing so. It will be the natural consequence of being found guilty of misconduct, not a punishment for inducing him to speak.*⁹⁷³

This case in effect exposes the complexities entailed in soliciting the employee to answer criminal allegations by the employer. The labour law

⁹⁷² 1996 1 SA 1152 (W) 1157 F-G and 1158 G-H. Applied from labour law perspective in Grogan J *Workplace Law* (2017) 256; From a civil procedure perspective in Cilliers A C , Herbstain J, Loots C; Nel HC *The civil practice* at page 757 and from a human rights perspective in Currie I & De Waal J *The Bill of Rights Handbook* at 745.

⁹⁷³ Per Nugent J in *Davis v Tip No* 1996 1 SA 1152 (W) 1157F-G and 1158 G-H. This was also quoted in *Nedcor Bank Ltd v Behardien* 2000 1 SA 307 (C) at 313G-314H.

approach in disciplining employees suspected of criminal misconduct seems to be opposed to the criminal justice formal model that must embrace the fairness principles entrenched in section 35 of the Constitution. Embedded within these principles is the principle against self-incrimination. As seen in Chapters two and three, section 35 is founded on principles of fairness embracing proportionality. Proportionality was earlier described as the cornerstone for dealing with matters of criminal law nature. Proportionality is observed in every process of criminal persecution, from as early as the beginning of the criminal investigations. The investigation of crime within flexibility approaches results in absurdities.

The evaluation of the observance of fairness by the employer is expected to be done by the commissioners at the CCMA at the moment when the matter goes for review is tantamount to latching the stable door after the horse had bolted. At that moment, the employee criminal suspects' rights would have been violated and what would have been done, would not have been undone.

Trite to this circumstance is an argument that the ensued understanding of the reason to observe fairness in labour law criminal investigations and dismissal hearings only extends to substantive fairness and not procedural fairness. Even the ensued labour law substantive fairness is constricted within the confines of the LRA.⁹⁷⁴ LRA provisions guarantee flexibility against proportionality. They encourage employer disregard one of the principles of natural justice, which underlie constitutional fairness for criminal suspects.⁹⁷⁵

4 2 1 Procedural fairness associated with the determination of employee's guilt of a criminal misconduct

At the exclusion of other formal procedures entailing proportionality, the LRA makes certain requirements mandatory in determining procedural

⁹⁷⁴ Per Ngcobo J in *Sidumo* above note 180 paras 80-141.

⁹⁷⁵ The principle that no man shall be judged on his own cause.

fairness.⁹⁷⁶ In Chapters one, two and three it was shown that it is schedule 8 of the LRA, in particular read with other provisions⁹⁷⁷ that prescribes the steps that an employer has to comply with in order to establish procedural fairness.

It can be argued that these steps entail several aspects that must be investigated and satisfied in order to determine the guilt of the employee. In close proximity, these requirements can be said to encompass some of the elements of common law aspects of **just cause** mentioned in the previous Chapters—except the requirement of whether the investigation was fair and objective, which could enable traversing into the justiciability of the employer decisions.⁹⁷⁸ Schedule 8 steps are read to only include:

- The need for the employee to understand the levelled allegations.
- The need for the employee to be given an opportunity to respond to the allegations upon the employer providing the employee with sufficient information regarding the allegations.
- For the employee to understand that there ought to have been an explanation to the terminology used.
- That the terminology ought to have been explained in a language that the suspect understands.
- The employee is entitled to an opportunity to present its case in responding to the allegations. Such an opportunity entails being provided with a reasonable time to prepare a response. In order to be able to present the case, the employee must be allowed a representation of its own choice, even if it's a co-worker. The employee must be facilitated with an interpreter where required to help in the representations.

⁹⁷⁶ Chapter VIII of the LRA read with Schedule 8 provisions.

⁹⁷⁷ Chapter VIII of the LRA read with Schedule 8 provisions.

⁹⁷⁸ To the extent that it could be questioned if the employer observed all the ensued individual rights before, the employer made the decision to investigate the employee who committed a criminal misconduct.

- The person taking the decision must be neutral. If not, an objective person must ultimately inform the employee of the decision reached.
- The employee must have been aware of the existence of the rule and standard that has allegedly been breached. That the employee was aware or could have been reasonably expected to have been aware of the rule or standard. Not every institutional rule is written down, for example, some rules could be common knowledge while others could be either custom or practice. Some types of rules are normally communicated during meetings or posted on common walls and boards. The nature of employment relationships may be prone to certain specific rules automatically required in the existence of the employer and employee relationships.
- The rules or standards must be valid, lawful, and reasonable.
- Such rules or standards should generally be justifiable with reference to the operational requirements of the employer.
- The rule must be consistently applied by the employer in the workplace.
- The employee's breach of the rule / standard must be proved (who, what, when, why, how, where).
- Once breach of the rule by the employee has been established, it would still only constitute misconduct if there was fault / blame on the part of the employee in doing so (this is a common law requirement).
- Intention – a deliberate or “don't care” approach to breaching the rule and any possible harmful consequences.
- Negligence - if a reasonable person in the position of the employee would have foreseen possible harm being caused by his/her actions or omissions and would have taken steps to prevent such harm; but the employee in question failed to do so.

The abovementioned considerations whilst important, do not satisfy all the complexities of fairness procedures entailed in constitutional fairness principles entrenched in section 35 of the Constitution. Instead of being

oriented to justice necessary for criminal suspects, these considerations only focus on employer interests and not employees' involved rights and interests. It can be argued that the entailed considerations are meant for creating a room for employer ability to express whether in the circumstances of the matter, the employee can be said to have breached their employer's trust. Nothing in these considerations contemplates the possibility that the employer may affect the employee rights as a criminal suspect and therefore be cautious not to jeopardise such rights.

In *Avril*⁹⁷⁹ a synthesised summary of schedule 8 employer interests reads;

The Code specifically states that the investigation preceding a dismissal "need not be a formal inquiry." The Code requires no more than that before dismissing an employee the employer should conduct an investigation, give the employee or his/her representative an opportunity to respond to the allegation after a reasonable period, take a decision and give the employee notice of that decision. This approach represents a significant change from what may be termed the "criminal justice" model developed by the erstwhile Industrial Court under the 1956 LRA. Complex tests for bias may have been appropriate under that model. However, the rules introduced by the Code are based on the idea that true justice for workers lies in a procedure for expeditious and independent review of the employer's decision, with reinstatement stipulated as the primary remedy if the employer cannot defend its decision to dismiss the employee.⁹⁸⁰

The *Avril* case⁹⁸¹ exposes that schedule 8 expounds duties that, if performed, would vindicate the employer's decision to dismiss the employee as justified before the CCMA.⁹⁸²

⁹⁷⁹ *Avril* above note 6 at 834-838 at 1652.

⁹⁸⁰ *Avril* above note 6 at 834-838 and at 1652.

⁹⁸¹ *Avril* above note 6 at 834-838 and at 1652.

⁹⁸² *Avril* above note 6 at 834-838 and at 1652.

4 2 2 The process of hearing a criminal misconduct matter

The LRA Schedule 8⁹⁸³ expresses indicators of a process for hearing criminal misconducts. At the onset, the employer is mandated to prepare for a hearing of employee criminal suspects matters.⁹⁸⁴ On this stance, the employer can be compared to the Director of Public Prosecution who is *dominus litis* in matters of criminal law nature. Before the hearing, as shown earlier in Chapters one, two and three, the employer will investigate the allegations against the employee.⁹⁸⁵ It will be the outcome of internal investigations that would prompt the hearing that possible misconduct is apprehended.

As explained earlier, the LRA Code prescribes an informal enquiry process.⁹⁸⁶ According to this approach, a minimal proportional process is apprehended to meet fair procedure. This means that the employer is mandated to observe one leg of the natural justice fairness principles—the *audi alteram partem* rule—and not the *nemo iudex in propria sua causa* rule. In terms of the LRA, the initiative to hear the employee's side of the story cements the fundamental right to a fair hearing. But the procedure is flexible and does not become uniform to all employers. Each employer may devise a mixture of formal or informal processes.

The Labour Court has taken cognisance of the 'informality' of the process. In *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & another*,⁹⁸⁷ the Court held that the right to a fair procedure in terms of the LRA requires less stringent and formalised compliance than was the case under the unfair labour practice jurisprudence of the Industrial Court. The same approach

⁹⁸³ Item 3 (5) of Schedule 8.

⁹⁸⁴ Item 3 of Schedule 8.

⁹⁸⁵ Read chapter three part 3 2 1 dealing with the investigation of employees who committed criminal misconducts to found reason to dismiss.

⁹⁸⁶ Item 4(1) of Schedule 8.

⁹⁸⁷ (1998) 19 ILJ 635 (LC) 641 G. Also read *Grogan J Dismissal* (2014) 265.

as *Moropane*⁹⁸⁸ was also adopted by the Labour Court in *Avril*⁹⁸⁹ where the court held that,

When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by item 4 of the Code requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing. If the decision is to dismiss the employee, the employee should be given the reason for dismissal and reminded of his or her rights to refer any disputed dismissal to the CCMA, a bargaining council with jurisdiction, or any procedure established in terms of a collective agreement.... There is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like.⁹⁹⁰

Consequent to labour law jurisprudential fairness perspective explained in Chapter three, the *Moropane*⁹⁹¹ and the *Avril*⁹⁹² decisions emphasise flexibility within a caution of labour law acceptable limits. This approach seeks to exclude proportionality necessary in matters of criminal law nature.

⁹⁸⁸ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & another* 1998 19 ILJ 635 (LC)641G. Also read Grogan J *Dismissal* (2014) 265.

⁹⁸⁹ *Avril* above note 6 at 838 and at 1652.

⁹⁹⁰ *Avril* above note 6 at 834-841 and at 1644-1652.

⁹⁹¹ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & another* 1998 19 ILJ 635 (LC)641G. Also read Grogan J *Dismissal* (2014) 265.

⁹⁹² *Avril* above note 6 at 834-841 and at 1644-1652.

In effect, the *Avril*⁹⁹³ judgement recognises that even in the context of flexibility or ‘informality’, an employee is entitled to the minimum content of the right such as notification of the charges, a reasonable opportunity to prepare a response with appropriate assistance,⁹⁹⁴ an opportunity to state a case, the decision and reasons for the decision, amongst other things.

In *BEMAWU and Others v SABC and 10 Others*,⁹⁹⁵ Steenkamp AJ, while dismissing the appeal in this matter, held against the invocation of a hearing analogous to a hearing inclined to criminal procedure and supported the flexibility approach that was taken by the SABC in disciplining 100 employees. In his view “...a hearing chaired by an independent and experienced chairperson on the panel of a respected dispute resolution agency...envisages a hearing, albeit on paper without hearing oral evidence or argument...” Referring to the holding in *Avril’s case*,⁹⁹⁶ he held that the approach adopted by the SABC satisfies the requirements set out in the Code of Good Practice of the LRA. He held that it would be impeding for SABC to submit to the challenge of “having individual hearings for each individual employee numbering more than 100, along the lines of a criminal justice model.”

Referring again to *Avril’s case*, he outlined the encountered challenges as mentioned by Van Niekerk J, who deliberated that the conundrums that ensued in a disciplinary matter need not impede the workplace efficiencies. The court held that the essence of the LRA strikes balance in

...recognis[ing] not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognises that to require onerous workplace disciplinary procedures is inconsistent with the right to expeditious arbitration on merits. Where a

⁹⁹³ *Avril* above note 6 at 838 and at 1652.

⁹⁹⁴ Not essentially a legal practitioner even though the matter engaged is that of a criminal nature.

⁹⁹⁵ In *BEMAWU and Others v SABC and 10 Others* (J2239/2015) [2016] ZALCJHB 74 (2 March 2016), paras [16]-[18]; 2011 (32) *ILJ* 112 (LAC) at para 54.

⁹⁹⁶ *Avril* above note 6 at 838 and at 1652.

*commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioner at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employees.*⁹⁹⁷

In determining whether it was trite for the court to intervene in the matter between parties, it referred to *Booyens v Minister of Safety and Security*⁹⁹⁸ which held that courts can only intervene in incomplete disciplinary hearings under exceptional circumstances. Inferring that the matter of whether a formal criminal justice procedure is appropriate for employer investigatory and disciplinary hearings is not of these exceptional scenarios. The court considered that even if the procedure is informal, that would not lead to grave injustice. In the same note, the court⁹⁹⁹ ruling for the SABC, had this to say,

.... [I]n this case, it would appear to me that, firstly, the process adopted by the SABC will not lead to grave injustice. The union members will still have an opportunity to be heard. Secondly, and this foreshadows the question of an alternative remedy, justice may be attained by other means, that is the dispute resolution system prescribed by the L R A. In fact, in the case before me, the exceptional circumstances go the other way. Exceptional circumstances have necessitated the Corporation to adopt a procedure other than the normal procedure envisaged by its Disciplinary Code. Those circumstances are the number of employees involved and the operational efficiencies of the

⁹⁹⁷ 2011 32 ILJ 112 (LAC) at para 54.

⁹⁹⁸ (C60/08) [2008] ZALC 87; 2008 10 BLLR 928 (LC); 2009 30 ILJ 301 (LC) (14 February 2008) paras 40-43; also read, *BEMAWU and Others v SABC and 10 Others* (J2239/2015) [2016] ZALCJHB 74 (2 March 2016), paras [16]-[18]; 2011 32 ILJ 112 (LAC) at para 54.

⁹⁹⁹ *BEMAWU and Others v SABC and 10 Others* (J2239/2015) [2016] ZALCJHB 74 (2 March 2016), paras [16]-[18]; 2011 32 ILJ 112 (LAC) at para 54.

organisation. I would therefore have formed the view on the merits that the union has not established a clear right as is required for final relief. As I have mentioned, I have also foreshadowed the question of an alternative remedy. The union members in this case, as any other employee in any other dismissal case, have the alternative remedy of approaching the CCMA, should the independent chairperson appointed by Tokiso find that they committed the misconduct complained of; should that chairperson recommend a sanction of dismissal; and should the SABC implement that sanction. For that reason, also, I would have turned down the application.¹⁰⁰⁰

Using Cora Hoexter's terminology, the flexible approach confirmed by Steenkamp AJ,¹⁰⁰¹ "seems to be a mixed one of variability within a framework of conceptualism." In plain language, the jurisprudence referred to above, very clearly establishes that while the overall principle of fairness cannot be compromised, the constituent elements of that right might to a greater or lesser extent be limited or rendered inapplicable consistent with the currently explained employer criminal investigations for the dismissal of employees suspected of criminal misconduct.

It appears that, in keeping with the flexibility of the process and the need for quick and efficient dispute resolution procedures, the Labour Court has refused to intervene in employer criminal disciplinary proceedings.¹⁰⁰² To this extent, labour law seems to have, instead of adopting the constitutional perspective of reasonableness within section 33 of the Constitution, sustained the common law administrative review rigidity. Under common law, prior recognition of individual rights, quasi-judicial review was highly

¹⁰⁰⁰ *BEMAWU and Others v SABC and 10 Others* (J2239/2015) [2016] ZALCJHB 74 (2 March 2016), paras [16]-[18]; 2011 32 ILJ 112 (LAC) at para 54.

¹⁰⁰¹ *BEMAWU and Others v SABC and 10 Others* (J2239/2015) [2016] ZALCJHB 74 (2 March 2016), paras [16]-[18]; 2011 32 ILJ 112 (LAC) at para 54.

¹⁰⁰² Including the following cases *Carephone (Pty) Ltd v Marcus NO and others* 1998 11 BLLR 1093 (LAC); *Shoprite Checkers (Pty) Ltd v Ramdau NO and others* 2001 9 BLLR 1011 (LAC); *Sidumo* above note 180 paras 78-79; *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others* 2009 11 BLLR 1128 (LC); *Herholdt v Nedbank Ltd* 2012 9 BLLR 857 (LAC); *Herholdt v Nedbank Ltd* 2013 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd; (Kloof Gold Mine) v CCMA and others* 2014 1 BLLR 20 (LAC).

limited because decisions were highly protected from review. Much like the current labour law demands, Courts were to exercise some extent of deference in reviewing decisions by the authorities.

The case of the *National Transport Commission v Chetty's Motor Transport Co, (Pty) Ltd*,¹⁰⁰³ for example, confirmed limitations regarding the application of the "symptomatic unreasonableness rule" by insisting on a higher degree of unreasonableness. It introduced the presumption that a responsible administrative authority carries out its duty properly and honestly.¹⁰⁰⁴ Together these two limits placed an exceedingly heavy onus on an aggrieved party, thereby reducing individual ability to seek review of administrative decisions. Since this approach was premised on the legal order, any attempt by the courts to move away from the interpretation was usually met with restraint and rejection.¹⁰⁰⁵

In the same circumstances, the hope for an aggrieved employee that the rights that were not observed in the initial employer criminal investigations and the subsequent hearing for dismissal could be redeemed at the review stage before the CCMA becomes detrimental. Apart from the limited scope of review, the nature of substantive fairness afforded by labour law within which parameters the employer investigates, employee criminal misconducts do not equate to substantive fairness as envisaged in the domain of the criminal justice.

Substantive fairness in labour law is contextualised within the employer flexibility. As seen earlier, the employer exercises discretion to dismiss

¹⁰⁰³ 1972 3 SA 726 (A). Also see Taitz above note 16 at 11.

¹⁰⁰⁴ *Chetty's Motor Transport* above note 16 at 735 F-G. Also see *Shidiak v Union Government* 1912 AD 651 652; *Union Government v Union Steel Corporation* 1928 AD 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263(A) 271; *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 (3) SA 651 (A).

¹⁰⁰⁵ This is marked by the different decisions, which lacked consistency regarding the extent of administrative discretion. See *Shidiak v Union Government* 1912 (AD) 651; *Union Government v Union Steel Corporation* 1928 (AD) 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A); *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 3 SA 651 (A).

based on rules, policies and the LRA requirement. As illustrated in Chapters two and three, if the employer could demonstrate that necessary progressive steps were followed in dealing with the issue at hand, the employer would have managed to satisfy substantive *fairness*.¹⁰⁰⁶ Within the scope of LRA requirements, as explained in Chapter three, the CCMA determines if the employer decision satisfies the test in *Sidumo*.¹⁰⁰⁷

4 2 3 The presentation of charges to the employee criminal suspect

In terms of the LRA, an employee suspected of crime is charged and served with documents containing the allegations to answer. This process is synonymous to the procedure under the CPA. The charge contains employer allegations against the employee. The case of *Korsten v MacSteel (Pty)Ltd & another*, for example, ¹⁰⁰⁸held that in order that employees are enabled to prepare for their defences, charges must be appropriate and clear. It is also the employer's responsibility that the concerned employee is notified of the charges or allegations to answer. The supposition is that in cases where employees are not made aware of the charges, they will not be able to prepare.¹⁰⁰⁹

In terms of Item 4 of the Code, the charges need not be formal charge sheets annexed to formal procedures for the leading and cross examination of witnesses and the use of formal rules of evidence, legal representation, and independent decision-making. In anticipation, a more informal approach to the employer's charges is expected, unlike in the case of criminal justice processes where the underlying objective in drafting a

¹⁰⁰⁶ Per Ngcobo J in *Sidumo* above note 180 paras 80-141.

¹⁰⁰⁷ *Sidumo* above note 180 paras 80-141.

¹⁰⁰⁸ *Korsten v Macsteel (Pty) Ltd & another* 1996 (8) BLLR 1015(IC) at 1020 C-E. Also see *Doody v Secretary of State for the Home Department & others* [1993] 3 All ER 92 at 106.

¹⁰⁰⁹ *Korsten v Macsteel (Pty) Ltd & another* 1996 (8) BLLR 1015(IC) at 1020 C-E. Also see *Samtor Tankers (Pty)Ltd v Kule* 1993 14 ILJ 1038 (LAC).

charge sheet is the avoidance of uncertainty regarding the facts that ought to be proven against the criminal suspect.¹⁰¹⁰

The employer's allegations against the employee are drafted on a form and language that the employee can understand. The drafted charges are expected to enable the employee to understand the nature and the cause of the allegations. The objective of these charges is to enable the employee to properly consider the matter, and to give the employee suspected of a criminal misconduct the opportunity to prepare a reply. The employer will divulge the basis of its blames in broad terms. The employer will state the circumstances on which such accusations originated.

The employer will, in addition, supply documentary evidence if such will be relied on during the hearing. Such evidence must accord with the standard admissibility principles of evidence.¹⁰¹¹ The case of *Klein v Dainfern College*¹⁰¹² deals with disclosure in the context of disciplinary proceedings. According to this case under common law, employees were entitled to have charges clearly formulated. They ought to be of sufficient particularity.¹⁰¹³

From a criminal law perspective, in *Mkolo and Others v Jacobs and Another*,¹⁰¹⁴ applicants lodged a complaint in terms of section 85 (1) (a), (b), (c) and (d) of the Criminal Procedure Act 51 of 1977. They pleaded that they were before court on charges lacking sufficiency. They said charges lacked sufficient details because, amongst others, "not all the requested particulars were provided by the second respondent as to how each of the accused

¹⁰¹⁰ To understand the requirements from a criminal justice perspective, read Joubert JJ *Criminal Procedure Handbook* 172.

¹⁰¹¹ The provisions dealing with documentary evidence pertain the following; The Civil Proceedings Evidence Act 25 of 1965: sections 19 and 33; The Criminal Procedure Act 51 of 1977: sections 221(5), 234, 246 and 247. Legal meaning of document can be secured from *Seccombe v Attorney-General* 1919 TPD 270 at 277. The meaning of documentary evidence is in section 33 of the Civil Proceedings Evidence Act 25 of 1965; sections 221(5) and 247 of the Criminal Procedure Act 51 of 1977 and Schwikkard and Van der Merwe *Principles of Evidence* 50 § 202. Court differentiation of admissibility and authenticity of a document presented as evidence is in *Motata v Nair NO and Another* 2009 1 SACR 263 (T) at 254.

¹⁰¹² 2006 3 SA 73 (T), at para [9] and [35].

¹⁰¹³ 2006 3 SA 73 (T), at paras [9] and [35].

¹⁰¹⁴ *Mkolo and Others v Jacobs and Another* (1831/2015) [2017] ZAECHGHC 46 (11 April 2017) para [8].

acted in common purpose with the others.”¹⁰¹⁵ This circumstance affected their ability to plead to the charges in accordance with entrenched *section 35 (3) (a)* of the Constitution.¹⁰¹⁶ The applicants, therefore, requested the court to order the first respondent to withdraw the charges and that if the respondents may wish to reinstate the charges, they should do so with “the authority of the Director of Public Prosecutions as provided for in *section 342 A of the Act*.”¹⁰¹⁷

It is submitted that lack of particularity goes with the foundation of a matter to the extent that the person charged may be exonerated if the charges are lacking particularity. It is through the charges that the court may decipher trivialities from realities. The seriousness of drafting proper charges seems to be aligned to constitutional entrenchments supporting proportionality in matters of a criminal law nature. From a purely labour law perspective, such enactments are lacking, and it may be questioned if it is possible that employees suspected of commission of criminal misconducts are protected from subjections to misapprehensions as to the specific acts or conducts being investigated as crimes against them.

The current position under the LRA, is that precision in drafting charges is not strictly demanded from employers as it is a standard in matters of criminal law nature.¹⁰¹⁸ In determining whether to charge the employee for external criminal conduct, the employer considers factors such as the nature of the conduct of the employee;¹⁰¹⁹ the work that the employee performs;¹⁰²⁰ the status of the employee with regards to the employee’s

¹⁰¹⁵ *Mkolo and Others v Jacobs and Another* (1831/2015) [2017] ZAECGHC 46 (11 April 2017) para [8].

¹⁰¹⁶ (3) Every accused person has a right to a fair trial, which includes the right –
(a) To be informed of the charge with sufficient detail to answer it.

¹⁰¹⁷ *Mkolo and Others v Jacobs and Another* (1831/2015) [2017] ZAECGHC 46 (11 April 2017) para [8] CPA.

¹⁰¹⁸ *POPCRU v Minister of Correctional Services & Others* 1999 20 ILJ 2416(LC); *NUM obo Matela v New Vaal Colliery* 1999 3 BLLR 332 (IMMSA); *NUM & Others v CCMA & Others* 2011 32 ILJ 956(LC). As well read Schedule 8 Item 4 (1) - (4).

¹⁰¹⁹ See Schedule 8 Item 4(1) – (4).

¹⁰²⁰ See Schedule 8 Item 4(1) – (4).

position;¹⁰²¹ the nature of the employee and employer relationship;¹⁰²² the employer would also consider the extent of its establishment;¹⁰²³ the extent to which the employer affected other employees as well as the person or institution affected by the employee's actions.¹⁰²⁴

In addition to these considerations, the Director of Public Prosecutions, unlike the employer, uses a particular format in drafting charges and is aware of the principle of proportionality under the CPA. .¹⁰²⁵ This accords with the formal nature of criminal proceedings aimed at meeting proportionality.

The CPA dedicates a whole Chapter¹⁰²⁶ to the specifications for charges against accused persons. An accused person is statutorily allowed to object to the charge that does not comply with the Act.¹⁰²⁷ The gist of these stipulated individual interests is not catered for under the LRA flexible employer discretions.

4 2 4 Adequate notice of factual criminal misconduct allegations

In accordance with the LRA and the ILO provisions,¹⁰²⁸ failure by the employer to instigate disciplinary processes against an employee offender within a reasonable time, is potentially prejudicial to an employee. Within the prescripts of the national and international provisions that South Africa prescribes to, it is required that employers sufficiently notify employees of the facts underlying the charges against the employee.¹⁰²⁹ The employers

¹⁰²¹ See Schedule 8 Item 4(1) – (4).

¹⁰²² See Schedule 8 Item 4(1) – (4).

¹⁰²³ See Schedule 8 Item 4(1) – (4).

¹⁰²⁴ See Schedule 8 Item 4(1) – (4).

¹⁰²⁵ Joubert JJ *Criminal Procedure Handbook* 172.

¹⁰²⁶ Chapter 14 of the CPA entailing sections 80-104.

¹⁰²⁷ Section 85 of the CPA.

¹⁰²⁸ Schedule 8 item 4 of the LRA read with Article 11(5) of the International Labour Organization's ("ILO") Termination of Employment Recommendation 119 of 1963 and Article 10 of the ILO Convention 158 of 1982 as well as ILO Recommendation 166 of 1982.

¹⁰²⁹ Schedule 8 Item 4 (1) - (4).

must afford the employees sufficient detail to the charges, in order to enable the employee to understand the charges and therefore reserve time to prepare a response.¹⁰³⁰ The time allowed to an employee who understood the allegations to respond to them, should be reasonable. The employer must afford the employee enough time to consider the levelled accusations.¹⁰³¹

The employer must apprehend that the employee may need time to obtain assistance where the employee requires such and, in turn, prepare defence against the allegations. If the employer fails to observe these requirements, the employee would be considered to have denied the employee the right to a fair procedure. In *Nkomo & others v Administrator, Natal & others*¹⁰³² the employer who only gave 48 hours, within a weekend, to accused hospital workers, to prepare their written responses to their proposed dismissal, was regarded by the court to have afforded inadequate time in the circumstances. The court held that while the employer sought to afford the employees opportunity to reply, such opportunity was an illusory because it was “inadequate and did not constitute proper compliance with the requirements of the *audi alteram partem* rule.”¹⁰³³

In another matter, *Police and Prisons Civil Rights Union and 75 Others v Minister of Correctional Services and Others*, a case decided in terms of sections 3(2) and 4 of the PAJA, the Western Cape High Court found that 48 hours’ notice for a disciplinary hearing was tantamount to inadequate notice. It was labelled inadequate “by any stretch of the imagination.”¹⁰³⁴ The significance of timing associated with the holding of a disciplinary hearing is that, the principle that an employer must not only give an employee adequate notice of the hearing, but it is also aligned with ensuring

¹⁰³⁰ Schedule 8 Item 4 (1) - (4).

¹⁰³¹ Schedule 8 Item 4 (1) - (4).

¹⁰³² 199112 ILJ 521 (N) Per Page J at page 528.

¹⁰³³ *Nkomo & others v Administrator, Natal & others* 199112 ILJ 521 (N) Per Page J at page 528.

¹⁰³⁴ *Police and Prisons Civil Rights Union and 75 Others v Minister of Correctional Services and Others* (603/05) [2006] ZAECHC 4; 2008 3 SA 91 (E); 2006 2 All SA 175 (E); 2006 8 BCLR 971 (E); 2006 4 BLLR 385 (E) (12 January 2006) at para 73.

that the disciplinary hearing is held within a reasonable time to avoid delays. It is therefore reasonable that the employer hears the matter within a short while, after the employer became aware of the commission of the misconduct.

Concomitant to this requirement, is the assumption that, “the employer waived the right to terminate the employment of a worker for misconduct if the employer failed to do so within a reasonable time after acknowledging the employee’s misconduct.”¹⁰³⁵ This however depends on the circumstances of the case. Within the labour law context of fairness, it would be determined, whether there was no possible indicator that a fair reason to terminate the employee’s employment existed. ¹⁰³⁶ Disciplinary processes are, by their nature speedy processes. Therefore, they do not conform to the detailed requirements of section 35 fairness.

Based on the labour law objective of speedy hearings, allegedly the employer executes haste justice, which overlooks employee criminal suspects’ rights. These rights are enforced if fair trial principles entrenched in section 35 of the Constitution are observed. Criminal justice does not accommodate haste criminal investigations and hearing processes. It demands a higher standard of proof in declaring a suspect’s criminality. It uses a beyond reasonable doubt standard of proof and not on a balance of probabilities standard of proof used in labour law. In chapters two and three, it was argued that the standard of beyond reasonable doubt, is met through the observance of proportionality negated in labour law within the parameters of flexibility.

¹⁰³⁵ Article 10 of the ILO Convention 158 of 1982 and ILO Recommendation 166 of 1982.

¹⁰³⁶ Certain contracts are terminated without notice for cause recognised by law. For example, within section 37(6)(b) of the Basic Conditions of Employment Act 75 of 1997, as amended (BCEA).

4 2 5 The right of the employee criminal suspect to legal representation

Section 35 of the Constitution entrenches the right of a criminal suspect to legal representation. In chapter three, it was argued that this right is of essence in order to avoid possible flaws in the persecution of a criminal suspect.¹⁰³⁷ At the centre is the eminent possibility of self-incrimination. Since labour law does not put much value to this possibility, the need for an employee criminal suspect to have legal representation immediately when the time of investigation is underrated.¹⁰³⁸

The right of an employee criminal suspect to legal representation is not perceived as a direct constitutional right like in other criminal cases but is subjected to exceptions within the discretion of a commissioner and when the matter is already before the CCMA at the review stage.¹⁰³⁹

In accordance with the CCMA rule, Rule 25(1)(C) can only be afforded in certain circumstances namely, “where parties agree; based on the nature of the questions of law raised by the dispute; the complexity of the dispute; the public interest and the comparative ability of the opposing parties or their representatives to deal with the dispute.”¹⁰⁴⁰

The application of Rule 25 excludes the inception of the employee criminal suspect's investigation and hearing for dismissal based on a criminal misconduct. In accordance with the LRA,¹⁰⁴¹ the employee is entitled to a reasonable period to prepare a response and to be assisted by a trade union representative or fellow employee of his choice.¹⁰⁴²

¹⁰³⁷Read about the importance of this right and other related in 3 2 6 Constitutional principles underlying investigations of suspects of criminal acts.

¹⁰³⁸ In labour law the need to satisfy the reasons for dismissal requires employers to do criminal investigations and hold hearings against the ensued prejudices such as the potential that the employee may end up incriminating itself in the course of the processes. The employee can either claim or not claim the right against self-incrimination at their own peril. See Grogan J *Dismissal* (2018) 419-420.

¹⁰³⁹ *CCMA v Law Society, Northern Provinces* 2013 11 BLLR 1057 SCA at para 21.

¹⁰⁴⁰ du Toit D et al *Labour Relations Law* 457

¹⁰⁴¹ Schedule 8, Item 4(1).

¹⁰⁴² Schedule 8, Item 4(1). But not a legal representative.

This requirement applies to both stages of preparation for the hearing and representation within such a hearing.¹⁰⁴³ In accordance with the Industrial Court decision in *Mahlangu*,¹⁰⁴⁴ where the court insisted on a proper enquiry and not an interview by the employer to the employees, it can be argued that the rationale for requiring the assistance for the hearing of the employee's matter, is that the employee may be assisted to prepare for the case and that there ought to be a spectator . to discern the fairness of the disciplinary proceedings. This is of essence because of the involved rights of the employee.

As *Mahlangu*¹⁰⁴⁵ held, the employee subjected to persecution by the employer has multifarious rights to protect;

*a right to challenge any statements which are detrimental to his credibility and integrity; the right to be told the nature of the offence or misconduct with relevant particulars of the charge; the right of the hearing to take place timeously; the right to be given adequate notice prior to the enquiry; the right to some form of representation (the representative could be anyone from the work-place; either a shop steward, works council representative, a colleague or even a supervisor, so as to assist the employee and ensure that the discipline procedure is fair and equitable); the right to call witnesses; the right to an interpreter; the right to a finding (if found guilty, he should have the right to be told the full reasons why); the right to have previous service considered; the right to be advised of the penalty imposed (verbal warnings, written warnings, termination of employment); and the right of appeal, i.e. usually to a higher level of management.*¹⁰⁴⁶

The ensued rights cannot be observed if the employee is deprived of a fair hearing but instead, subjected to a process tantamount to an interview. In addition, it can be argued that a spectator who is not knowledgeable in law

¹⁰⁴³ Schedule 8, Item 4(1).

¹⁰⁴⁴ *Mahlangu v Cim Deltak, Gallant v Cim Deltak* 1986 7 ILJ 346 IC at 357–358.

¹⁰⁴⁵ *Mahlangu v Cim Deltak, Gallant v Cim Deltak* 1986 7 ILJ 346 IC at 357–358.

¹⁰⁴⁶ per Bulbulia AM, J in *Mahlangu v Cim Deltak, Gallant v Cim Deltak* 1986 7 ILJ 346 IC at 357-358.

may not effectively assist the employee facing criminal charges for a dismissal. Without the assistance of a legal professional who is knowledgeable in law and, in particular, one who is able to articulate the depth of a criminal accusation, the employer would easily overlook the essence of a criminal accusation which the employer is levelling against the employee.

Dealing with the question of a criminal misconduct as grounds for dismissal, it is confronted with many challenges, because even if this is executed within labour law prescripts, “dishonesty must not be merely suspected but it must be proved, although this proof may be based on a balance of probabilities.”¹⁰⁴⁷

Accordingly, arguing from a labour law perspective, Levy observed that,

*[t]heft is without doubt the most difficult situation that an employer has to deal with. I have said that it is unwise and probably unfair to dismiss an employee without notifying him of the reason. [However,] proof that a man has committed theft is a matter for the criminal courts and not for a unilateral decision by an employer. Inevitably, the employer's decision to fire for theft is based on evidence that would not obtain a conviction in a criminal court.... If the employer has based his evidence on suspicion, hearsay or security reports and there is no hard evidence, he is not entitled to say that a theft has occurred. He therefore has no justification to dismiss for theft.*¹⁰⁴⁸

Levy's argument raises another concern regarding the complexity of hearings on matters of a criminal law nature, which even exclude the use of legal professionals. A non-legal professional watchdog would not be able to decipher whether, the employer's decision to dismiss was based on proven facts and acceptable evidence and not on mere suspicion.

¹⁰⁴⁷ See *Mine Workers' Union v Brodrick* 1948 (4) SA 959 and *Federal Cold Storage Co v Angehern & Piel* 1910 TPD 1351.

¹⁰⁴⁸ Levy *A Unfair Dismissals* 81-82.

In *NUM v Blinkpan Collieries*,¹⁰⁴⁹ the Industrial Court held for the importance of proper representation. Shunning away implied passive representations, it emphasised on the acute need for a sufficient and effective representation of employees who are “illiterate or uneducated.”¹⁰⁵⁰ It can be argued that the court forces the employers, in ensuring that employees who are suspected of committing criminal misconduct, not only understand the nature of the charges and the allegations against them, but also that they understand the nature of the processes that they are subjected to. Such employees ought to be assisted in exercising the entitled rights, especially the right to be legally represented.

It has been noted earlier that unlike from the demands of section 35 of the Constitution entrenching fair trial rights for matters of a criminal law nature, the entitlement to representation in labour matters does not mean a representation by a lawyer or legal practitioner. The parties in labour matters agree to representation on a case-by-case basis or even in a collective agreement. This flexibility has led to multifarious procedural differences. According to the Supreme Court of Appeal decision in *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani*,¹⁰⁵¹ the right to legal representation in tribunals other than courts of law with regards to labour matters was non-existent under common law.¹⁰⁵²

In the current dispensation, and especially through section 33 of the Constitution and the PAJA provisions, it is recognised that certain cases and circumstances mandate the need for legal representation. It is an argument in this thesis that disciplinary hearings on misconducts of criminal law nature fall within the category of cases that need legal representation. More so because of the complexity of matters of a criminal law nature. In

¹⁰⁴⁹ *NUM & another v Blinkpan Collieries* 1986 7 ILJ 579 (IC) at 583 per van Schalkwyk AM.

¹⁰⁵⁰ *NUM & another v Blinkpan Collieries* 1986 7 ILJ 579 (IC) at 583 per van Schalkwyk AM.

¹⁰⁵¹ 2004 25 ILJ 2311 (SCA) para [11].

¹⁰⁵² 2004 25 ILJ 2311 (SCA) para [11].

the attempt to bring these categories of matters closer to the observance of section 35 constitutional fairness principles, regarding matters of a criminal law nature, the need for representatives who are legal professionals is eminent.

Sections 35 (f) and (g) mandate that a person suspected of committing a criminal offence has to be afforded legal representation if not able to be represented by a legal practitioner of its choice. If the suspect does not know of this right, the suspect must be so informed of it. Within labour law jurisprudence there are other cases supporting the need for legal representation.

In the case of *Dladla v Administrator Natal*,¹⁰⁵³ the court found that the circumstances of the case warranted legal representation in that the employees' jobs and livelihood were at stake, the facts which involved issues of race, culture, language were complex, and the tribunal itself lacked independence. In another matter, the Supreme Court of Appeal ¹⁰⁵⁴ held in favour of employing a legal representative due to the circumstances of the case, notwithstanding the employer's internal rule that excluded legal representation at disciplinary hearing proceedings.¹⁰⁵⁵

The Constitutional Court reiterated the need to have a legal representative even at the investigation stage, preparation stage and the hearing stage. It held that the legal representation must participate fully in the proceedings except in giving evidence on behalf of the witness.¹⁰⁵⁶ The extent to which this is practicalised is minimal.

¹⁰⁵³ *Dladla & (and) Others v Administrator, Natal & (and) Others*; 1995 16 6 ILJ 1418 (N) pp. 1418-1426.

¹⁰⁵⁴ *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & (and) Others* 2002 23 9 ILJ 1531 (SCA) pp. 1531-1543.

¹⁰⁵⁵ *Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & (and) Others* 2002 23 9 ILJ 1531 (SCA) pp. 1531-1543.

¹⁰⁵⁶ *CMA v Law Society, Northern Provinces* 2013 11 BLLR 1057 SCA at para 21.

4 2 6 Opportunity to state a case and to challenge the employer's evidence and arguments

The LRA code¹⁰⁵⁷ requires that in order to meet the required standard of fairness, employees be allowed the opportunity to be heard as early as possible. They are supposed to listen to employer's evidence in order to challenge it before they can state their case.

As argued earlier,¹⁰⁵⁸ in this process, it is not clear whether the employee has a right to cross-examine the employer's evidence.¹⁰⁵⁹ Bearing the fact that the right to legal representation in employer disciplinary processes is compromised, the employee as a non-legal professional may not master the skills of cross-examination.¹⁰⁶⁰ However, the ultimate dictates that the employee will have to reply to the employer allegations without guidelines from the legal professionals. In trying to challenge the reliability of the employer's allegations to shed light as to the truthfulness or untruthfulness of them, the employee may benefit the employer more than vindicating the case.¹⁰⁶¹

The employer, who is eager to reach managerial objectives, can take advantage of employee's vulnerability.¹⁰⁶² It is possible, undoubtedly in many cases that the employees submit to coerced interrogations as well as unfounded allegations and then divulge self-incriminating evidence at the expense of their individual rights expressed in section 35 of the Constitution. As held in *Mine Workers' Union v Brodrick*,¹⁰⁶³ it may be possible that at the dilemma of establishing the employee's blame regarding the criminal

¹⁰⁵⁷ Schedule 8 Item 4(1).

¹⁰⁵⁸ Para 4 2 5.

¹⁰⁵⁹ See *Mine Workers' Union v Brodrick* 1948 (4) SA 959 and *Federal Cold Storage Co v Angehern & Piel* 1910 TPD 1351

¹⁰⁶⁰ See *Mine Workers' Union v Brodrick* 1948 (4) SA 959 and *Federal Cold Storage Co v Angehern & Piel* 1910 TPD 1351.

¹⁰⁶¹ Through self-incrimination. See Grogan J *Dismissal* (2018) 419-420 who explains the extent to which self-incrimination is considered in labour law cases.

¹⁰⁶² *Mine Workers' Union v Brodrick* 1948 (4) SA 959 and *Federal Cold Storage Co v Angehern & Piel* 1910 TPD 1351.

¹⁰⁶³ *Mine Workers' Union v Brodrick* 1948 (4) SA 959 and *Federal Cold Storage Co v Angehern & Piel* 1910 TPD 1351.

misconduct the employer acts unreasonably. When all else failed, within the best information available to it in the circumstances, the employer may on its enthusiasm or anxiety to solve the ensued dishonesty problem, brush aside the rights of the employee and act on information that is founded on suspicion and hearsay.¹⁰⁶⁴

This possibility is not overrated because unlike in the processes prescribed in the CPA, employee criminal suspects are never informed of their right to silence.¹⁰⁶⁵ The extent and limits of section 35 rights applicable to employee criminal suspects is not clarified nor observed in disciplinary processes. This is easily done because the law empowering the employer investigations is open-ended. The employer-wide discretion allows the use of every possible opportunity available.

In light of the fact that employer exercises wide discretion in investigating employee's criminality, there is a possibility of uncontrolled cooperation between the internal investigations and the police investigations.¹⁰⁶⁶ Consequently, the interlinked investigation could easily invade constitutional rights.

The case of *Coetzer*,¹⁰⁶⁷ evidenced the possibility of cooperation in interlinked investigations. This was a case that was held before the Financial Services Appeal Board of South Africa. The appeal was based on a decision by the Registrar to debar the appellant from rendering financial services to clients on behalf of authorised financial service providers. The Registrar's power to debar the appellant was based on section 14A of the Financial Advisory and Intermediary Services Act 37 of 2002, the "FAIS Act". The Registrar believed the appellant was no longer fit and proper to render a service to clients of financial service providers. This decision came

¹⁰⁶⁴ *Mine Workers' Union v Brodrick* 1948 (4) SA 959 and *Federal Cold Storage Co v Angeharn & Piel* 1910 TPD 1351.

¹⁰⁶⁵ Read para 4 2 5 above on the right of the employee criminal suspect to legal representation.

¹⁰⁶⁶ Refer to the case of *Minister of Police v RM M & Safety and Security Sectoral Bargaining Council* Case no: JR56/14 referred to below in para 4 3.

¹⁰⁶⁷ Unreported case of FSCA decided on the 12 August 2015.

after her employer, Old Mutual, had investigated a client complaint against the appellant and found a fraud allegation.

Based on this allegation, the appellant was summoned to explain why she should not be debarred. In her explanation, the appellant gave self-incriminating evidence which amounted to admitting guilt while pleading duress. Based on the self-incriminating evidence, her employer initiated a criminal case against her. During the investigation, the employer had secured evidence without a search warrant to found allegations against the appellant. Witnesses were utilised to give evidence against the appellant. Even though Old Mutual investigated a crime of fraud, it never informed the appellant in terms of section 35 of the Constitution about her right against self-incrimination and her right to remain silent, instead she was called to respond where upon she incriminated herself.¹⁰⁶⁸ The obvious reason is that informing the appellant with her right against self-incrimination was not sanctioned by the law that facilitated the criminal investigation against the employee by Old Mutual. In turn the employer opened a criminal case against the employee. The secured evidence was handed over to the police.¹⁰⁶⁹

The Coetzer matter forms part of a myriad of cases meant at enforcing the “right to fair dismissal,” entrenched in section 23(1) of the Constitution. All these cases imply that the employers do not observe sections 8, 33, 35, 39 and 195 of the Constitution in the execution of fair dismissals. They do not follow the constitutional demands that the interpretation of legislation and development of the common law or customary law by courts, tribunals or forums must promote the spirit, purpose, and objectives of the Bill of Rights. These constitutional objectives and values are entrenched in the Preamble, section 1 and section 195 of the Constitution. Their rationale is to transform

¹⁰⁶⁸ para [3].

¹⁰⁶⁹ Per Coetzer’s submissions before court. These submissions are not cited in the judgment.

our legal perspective from authoritarian to the realisation of constitutional transformative objectives which aim at a rights-based decision making. Contrary to the constitutional call, when employers investigate, and discipline employees suspected of criminal misconduct, they do not observe the rights of the suspects. First, they overlook the right to privacy without applying necessary limitations and precautions applicable when such a right is compromised. Further, they disregard the constitutional rationale of fairness. They encourage self-persecution. When the hearings for dismissals are carried out, suspects are asked to provide answers against employers' accusations at the risk of self-incrimination. On the one hand, this sacrifices the principle of fairness that no man shall be persecuted at his own cause. Where such compromises are made in law, in the guise to fair process, they let suspects incriminate themselves. On the other hand, employers can exercise authority without observing necessary guidelines. In the absence of a clear legal framework, providing individual suspects the opportunity to challenge the impinging parallel investigations, as it happened in this case, without the need to actually provide evidence that there was interference, the process as it stands is prejudicial and unconstitutional.¹⁰⁷⁰

4 2 7 The possibility to dispense with the hearing of an employee suspected of a criminal misconduct

Item 4(1) and (3) of schedule 8, mandates employers to confine to pre-dismissal procedures, except where exceptional circumstances exist.¹⁰⁷¹ The decision as to whether a situation constitutes exceptional circumstance is within the employer's discretion because the interpretation of this concept within labour law has received minimal attention. It can be argued that in

¹⁰⁷⁰ A similar observation was made in *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005). Also see *Brennan v. Occupational Safety and Health Rev. Comm'n*, 505 F.2d 869, 87273 (10th Cir. 1974).

¹⁰⁷¹ Item 4(4) of schedule 8. Refer to the case of *Metal & Allied Workers Union & Others v Siemens Ltd* (1987) 8 ILJ 117 (IC).

these circumstances there is a possibility that employers dispense with these procedures, even where exceptional circumstances do not necessarily exist. In accordance with article 7 of the ILO Convention 158 of 1982, such instances entail occasions where the employer cannot reasonably be expected to observe the guidelines.¹⁰⁷² It is argued that such occasions are in effect rare and complex because in the same stance, the employer facilitating an employee the opportunity to respond to the allegations actualises the right to fair dismissal. Within this right is the need for the employee to be heard.

It is therefore trite to view the provision that employees dispense with the right to be heard an elusive provision, especially in the light of the South African rights based on the Constitution. Perhaps this provision may be understood as sustaining the employee flexibility to judge individual cases where the employer may exercise its discretion not to afford an employee a hearing. The case of *Librapac CC v Moletsane NO and Others*,¹⁰⁷³ explained exceptional circumstances as cases of “overriding extremity.” Courts have also referred to other examples including occasions where firstly, the employer sensed danger against life or property as exceptional circumstances.¹⁰⁷⁴ Secondly, scenarios where a crisis can be determined.¹⁰⁷⁵ Thirdly, occasions where the employee decides not to attend a hearing.¹⁰⁷⁶

According to Grogan,¹⁰⁷⁷ such scenarios entail circumstances where, “employees... by... conduct [abandon] or waive their right to hearings by refusing to attend the enquiry or by abusing the employer at the disciplinary hearing.”¹⁰⁷⁸ It is argued that a scenario where employees may argue that the hearing will affect their privilege against self-incrimination may be

¹⁰⁷² Article 7 of ILO Convention 158 of 1982.

¹⁰⁷³ 1998 19 ILJ 1159 (LC).

¹⁰⁷⁴ *Lefu v Western Areas Gold Mining Co* 1985 6 ILJ 307 (IC).

¹⁰⁷⁵ *Lefu v Western Areas Gold Mining Co* 1985 6 ILJ 307 (IC).

¹⁰⁷⁶ *Mfazwe v SA Metal & Machinery Company* 1987 8 ILJ 492 (IC); *Food & Beverages Workers Union & Others v Hercules Cold Storage (Pty) Ltd* 1990 11 ILJ 47 (LAC).

¹⁰⁷⁷ Grogan J *Workplace Law* (2007) 271.

¹⁰⁷⁸ Grogan J *Workplace Law* (2007) 271.

treated along the lines of this scenario. It is submitted that this provision is against the proportionality principles applied in matters of criminal law nature and is therefore classified as draconian. The reason meted to this classification is the possibility that the employer may misapprehend the situation and deprive the employee criminal suspect of the employee's right to be heard only to discover later that the decision was not appropriate, it may be hard for the employer to reverse the situation without jeopardising employee's interests.

This can happen especially with employees suspected of criminal misconducts and it is not so possible for this category to evoke remedies available to other employees who may be subjected to a similar situation. Even if this could be possible, the practical scenario is that the very same employer who flaunted the process would be expected to rectify it by holding a second hearing. It will obviously be hard for the employee to trust in the second attempt without an assurance that it will be a hearing by an independent and impartial person. This situation will indeed frustrate employee genuine efforts and become financially taxing to both the employer and the employee.

4 2 8 Jurisdictional resolutions on the charges of a criminal misconduct

An employee suspected of criminal misconduct is entitled to be informed of the employer's allegations. The information is given through reading charges to the employee criminal suspect. Once the charges of criminal misconduct have been read, then the employee criminal suspect will answer the charges and thus enter the plea. Once the plea has been entered then evidence is led, and the cross examination on witnesses from both parties, meaning the employer and the employee would take place. After the evidence of both parties has been presented, the chairperson would then determine the guilt or otherwise of the employee. If the chairperson finds the employee criminal suspect guilty, the chairperson having considered the

nature of the charges and evidence in mitigation or aggravation would determine the appropriate sanction.

The first is a factual issue in which the chairperson determines based on the evidence presented, whether the employee is guilty of the misconduct with which the employee has been charged. As explained above, in this process the chairperson will consider the evidence gathered by the employer in support of the allegations before deciding. As explained in the preceding chapters, in terms of Item 7(a) of the code, the chairperson enquires whether there was a workplace rule in existence that the employee flouted and enquires whether the employee breached that rule.

Depending on the circumstances, an employee may be entitled to question the validity or the reasonableness of the rule. This involves an assessment of the operational necessity for the rule. Within the prescripts of the LRA and in satisfying employer flexibility measures, the chairperson can only look at the nature of the matter before the hearing. In addition, the chairperson will militate on the grounds that form the basis of the rule under enquiry while paying regard to the general industrial relations practice.¹⁰⁷⁹

The case of *Hoechst (Pty) Ltd v CWIU*,¹⁰⁸⁰ held that disciplinary code-inscribed standards, sometimes referred to as rules of employee behaviour, are conventional by nature. According to this case, the employer determines the disciplinary code and standards as part of their agreement with the employee who has to comply with them.¹⁰⁸¹ In addition, the employer is tasked to set rules pertaining to the determination of sanctions.¹⁰⁸² Such sanctions are eminent when employees contravene the ensued standards and rules.¹⁰⁸³

It is submitted that the employer-set sanctions are different from legislature-set sanctions prescribed by the CPA and, as such, they are in effect worse

¹⁰⁷⁹ Item 7(b)(i) of Schedule 8. See *Hoechst (Pty) Ltd v CWIU* 1993 14 ILJ 1449 (LAC) at 1459.

¹⁰⁸⁰ 1993 14 ILJ 1449 (LAC) at 1459.

¹⁰⁸¹ *Hoechst (Pty) Ltd v CWIU* 1993 14 ILJ 1449 (LAC) at 1457.

¹⁰⁸² *Hoechst (Pty) Ltd v CWIU* 1993 14 ILJ 1449 (LAC) at 1459.

¹⁰⁸³ *Hoechst (Pty) Ltd v CWIU* 1993 14 ILJ 1449 (LAC) at 1459.

than the CPA proportional sanctions. In addition to the employer-made rules and sanctions are the common law-based rules embodying employee custom and practices. The common law-based rules are normally not spelt out in disciplinary codes. The rule that employees may not act in conflict with the interests of their employers is an example of such rules. The rest of the rules are inferred in the circumstances surrounding the misconduct that the employee is alleged to have committed.¹⁰⁸⁴

It is submitted that this scenario exposes the flexible nature of employer rules and standards to the extent that different employers may punish similar offences differently, contrary to the objectives of punishment emphasised within the proportionality-based types of punishment.

The employer is flexible in setting the rules and standards and is only limited by the principle of reasonableness within the rationale of the LRA.¹⁰⁸⁵ As shown in the previous chapters, employer reasonableness is measured within the labour law jurisprudential perspective bounds, as opposed to reasonableness within section 33 administrative law perspective. As *Brassey* succinctly states:

*...the employee can only be judged by reference to the standards that prevailed when he perpetrated the act complained of, since it is by reference to them that he is entitled to regulate his conduct. The employer, in short, can set standards within the band of reasonableness, but has no such latitude when the prevailing standards...come to be applied.*¹⁰⁸⁶

In essence, employer reasonableness engages the consideration of employer-set standards and established rules of enterprise in the light of

¹⁰⁸⁴ *Hoechst (Pty) Ltd v CWIU* 1993 14 ILJ 1449 (LAC) at 1459.

¹⁰⁸⁵ *Avril* above note 6 at 838 and at 1652. As well see *Sidumo* above note 180 para 59. Also read *Matsekoleng v Shoprite Checkers (Pty)Ltd* 2013 2 BLLR 130 (LAC) paras 54-57. Myburg A & Bosch C *Reviews in the Labour Courts South Africa* 271-282.

¹⁰⁸⁶ *Brassey M Employment and Labour Law* A8-71.

the general industrial relations practice.¹⁰⁸⁷ On the basis of this demand, it can be argued that the laxity engaged in varying flexibility determinations submits employer rules and standards to some major differences. Thus, the assessment of reasonableness on one employer may differ from the assessment of another employer. From this possibility emanate differing responses by different employers to the same misconducts. It was mentioned earlier in chapter three that even the same employer might come up with different responses for the same criminal misconduct committed by its employees, leading to different sanctions in comparable cases of misconducts.

This fluid approach was observed in *Donald Baphuthi v The CCMA and Others*,¹⁰⁸⁸ wherein employees accused of same dishonesty were offered different treatment. One employee was expelled while the other was given a written warning. Normally, the one expelled would view the dismissal as unfair but would not gain favour in labour law because the employer reasonableness cannot be challenged beyond the set rules of labour law. It would not be possible to test the justiciability of the decision outside the scope of the LRA reasonableness. It is argued that the unbalanced decision could fit squarely within the constitutional inequality clause purview.

In chapters one, two and three it is argued that the determination of employer reasonableness is comparable to the criticised common law high standard of unreasonableness, which rejected symptomatic unreasonableness rule.¹⁰⁸⁹ The ensuing employer unreasonableness insinuates a higher degree of unreasonableness because it substantially presumes that a responsible employer carries out its duty properly and honestly.

¹⁰⁸⁷ *Avril* above note 6 at 838 and at 1652. *Sidumo* above note 180 *para* 59. Also read *Matsekoleng v Shoprite Checkers (Pty)Ltd* (2013) 2 BLLR 130 (LAC) paras 54-57. Myburg A & Bosch C *Reviews in the Labour Courts* South Africa 271-282.

¹⁰⁸⁸ Unreported case no J1901/99, Labour Court 1999.

¹⁰⁸⁹ Paras 1;221;2212 and 331.

In so doing, it limits possible challenge of the employer decision to dismiss as it places an exceedingly heavy onus on an aggrieved party who would have to traverse the constitutional human rights approach supportive principles, before making sense of the injustices encapsulated within the employer decision. To do that, the employee is not necessarily expected to engage legal expertise. Unlike in criminal matters, the poor employee cannot willy-nilly, be afforded a legal practitioner at the expense of the state.

It is further argued that even if the employee would be afforded all the necessary information at the stage, when the employee engages the employer before the CCMA, chances of convincing the court would be slimmer because of the limited avenues that the CCMA would utilise.

The commissioners would not go beyond the labour law fora and start questioning the constitutionality of the employer decision within the equality clause provisions but would only be limited to considering whether the individual employee did not breach the employer's trust to the extent that it could not be mended. It is argued that these circumstances reduce individual ability to seek review before the CCMA. Any move to challenge it based on other determinations such as the employee's entrenched individual rights, like the rights entrenched in section 35 of the Constitution, is usually met with restraint and rejection.¹⁰⁹⁰

From labour law jurisprudence, there emerged reasonableness indicators and these include the scenarios in disputes where it could be argued that a rule or practice subject to dispute was not new because of its long application in similar circumstances.¹⁰⁹¹

In other scenarios, an employer would argue that the rule or practice subject to dispute emanated from their agreement with the employees or trade

¹⁰⁹⁰ This is marked by the different decisions, which lacked consistency regarding the extent of administrative discretion. See *Shidiak v Union Government* 1912 (AD) 651; *Union Government v Union Steel Corporation* 1928 (AD) 222; *Johannesburg Consolidated Investment v Johannesburg Municipality* 1903 TS 111; *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A); *Cassim v Oos-Kaapse Komitee van die Groepsgebied* 1959 3 SA 651 (A).

¹⁰⁹¹ *Sidumo* above note 180 para 59;78-79.

unions.¹⁰⁹² Within this reasoning would fall sanctions as within agreed terms and standards. In these instances, the CCMA's task is just to confirm the knowledge of the employee regarding the rule and whether indeed it is a standard rule or sanction without venturing into the justiciability of the rule or standard; whether the employee was aware of the rule and whether it has been consistently applied and nothing more.¹⁰⁹³ Knowledge by the employee of well-established rules and standards such as unwritten and common-law¹⁰⁹⁴ implied rules are assumed to be known by the employee. Within these categories are well-known customs and practices.¹⁰⁹⁵

It would seem the employer is not as bound as the employee to observe customs and practices as well as common law in determining matters of criminal law nature. This argument is trite in the circumstances where well-known principles of natural justice, especially the *judex in propria sua causa* rule engaging the principles against self-incrimination have been part of the South African common law since its inception. However, such principles are not observed by the employer criminal investigations and hearings based on employee criminal misconduct.

To affirm the labour law supported ignorance by the employer of well-known rules, in *Hoechst v Chemical Workers Industrial Union*,¹⁰⁹⁶ it was decided in the affirmative that employers need to strictly comply with these categories of laws as the basis of fair dismissal. In this case, the court judgment, amongst others, indicates that employers might dismiss employees for acts outside the scope of employment contract.

The case further held that dismissals may occur based on acts not covered by labour law disciplinary codes. If the alleged criminal conduct of the

¹⁰⁹² *Highveld District Council v CCMA & Others* 2003 23 ILJ 517 (LAC.)

¹⁰⁹³ Items 7(b)(ii) and (iii) of the Code.

¹⁰⁹⁴ the just cause principles.

¹⁰⁹⁵ the just cause principles.

¹⁰⁹⁶ 1993 14 ILJ 1449 (LAC).

employee impact materially on the relationship between the employer and the employee, the employer may dismiss the employee.¹⁰⁹⁷

The employers in most cases are concerned that codes of conduct are defaulted and yet they are also considered as guidelines. The codes of conduct cannot be willy-nilly departed from unless if not incorporated into the contract of employment. What matters is to afford the employee the right to be heard.¹⁰⁹⁸ This reasoning is in accordance with the discovered criminal misconducts.

As seen in chapter two, criminal misconducts are composed of categories of criminal acts committed within the hiring of the employee or such criminal acts which happened while the employee was not on duty. As long as employee's criminal acts impact negatively on the relationship that the employee has with the employer, such are criminal misconducts.¹⁰⁹⁹ It can be argued that within labour law, the categorisation of criminal misconducts may be associated to several concerns other than the employer and employee relationship. These may include the link that a crime which the employee perpetrated outside the employment premises has on the employer and employee relationship. For example, a police officer who commits rape outside the workplace tarnishes police integrity.

Consequently, three scenarios concerning employee criminal misconduct are at stake. Firstly, it would be of concern that the employee has perpetrated criminal acts at the workplace. Secondly, that the employee status of being a perpetrator may be associated with the integrity of the place of employment. Thirdly, that the employee status of being a criminal offender may negatively affect the employment relationship.¹¹⁰⁰

¹⁰⁹⁷ *Hoechst v Chemical Workers Industrial Union* 1993 14 ILJ 1449 (LAC) at pages 1459-1460 paras G-I.

¹⁰⁹⁸ *Highveld District Council v CCMA & others* 2002 12 BLLR 1158 (LAC).

¹⁰⁹⁹ See part 4 3 dealing with the Case of *Minister of Police v RM M & Safety and Security Sectoral Bargaining Council* Case no: JR56/14.

¹¹⁰⁰ *Malan v Bulbring NO & others* 2004 10 BLLR 1010 at 1017.

The failure to give reasons for the dismissal is the basis for unfair dismissal. It interferes with the fair procedure in disciplinary proceedings.¹¹⁰¹ At the finalisation of the hearing, the code demands that employees be informed of the outcome.¹¹⁰² This must be in writing.¹¹⁰³ It does not matter whether the outcome is negative or positive. The employee needs to understand the consequences following the finding. If the employer has decided to dismiss the employee, the employer must furnish the employee with reasons for dismissal. It would seem labour law differentiates between reasons and decisions.

The determination on the employee's guilt is the decision, while reasons are analogous to the rationale behind the finding. When the employer has decided to dismiss the employee, the employer is required to provide the employee with the reasons for his decision. The employer must tell the employee why in the circumstances of the case dismissal, it was appropriate and fair, as opposed to any other sanction. In order to do that, the employer is expected to observe the *Sidumo*¹¹⁰⁴ matter factors, mainly confining employers within the four corners of the LRA. That is to say, the employer would consider what is appropriate in the circumstances of the employee criminal suspect's case, even so within the *Sidumo*¹¹⁰⁵ matter perspective. It is argued that in these circumstances, employee criminal suspects would suffer prejudice in light of the possibility that the extent to which the finding that an employee is guilty of a criminal misconduct, would

¹¹⁰¹ *Jeffery v President, South African Medical and Dental Council* 1987 1 SA 387 (C).

¹¹⁰² Schedule 8 Item 2 read with Item 4 (3).

¹¹⁰³ Schedule 8 Item 2 read with item 5.

¹¹⁰⁴ *Sidumo* above note 180 para 59;78-79. Also read *Matsekoleng v Shoprite Checkers (Pty)Ltd* 2013 2 BLLR 130 (LAC) paras 54-57. *Mohammed v Chicken Licken* 2010 31 ILJ 1741 (CCMA) para 5.3.1.

¹¹⁰⁵ *Sidumo* above note 180 para 59;78-79. Also read *Matsekoleng v Shoprite Checkers (Pty) Ltd* 2013 2 BLLR 130 (LAC) paras 54-57. *Mohammed v Chicken Licken* 2010 31 ILJ 1741 (CCMA) para 5.3.1

be based on the constitutional fairness (pertaining to matters of a criminal law nature) would still be minimal.

The employer is expected to furnish sufficient reasons, which will enable the employee the ability to appeal the decision internally or for review and adjudication before the CCMA and Labour Court respectively. Before these jurisdictions, what is going to be determined are not only the facts but also the reason for the employee's dissatisfaction, based on analysing whether the employer's reasoning to have the employee dismissed was incorrect within the prescripts of the LRA.

4 2 9 1 Referral of employer's decision to dismiss the employee suspected of a criminal misconduct to arbitration or adjudication by the employee

Upon the decision of the employer to dismiss the employee, the employer must inform the employee of subsequent rights, namely, the right to refer the matter to arbitration or adjudication. This partly may be interpreted to be an indication that a dismissed employee has the automatic right to these processes by virtue of the law.

The consequent procedure after dismissal as seen in chapter three is the process of arbitration before the CCMA. In chapter three, it was explained that the CCMA determines fairness issues both for procedural fairness and for substantive fairness. As seen in Chapter three the employee can apply to the CCMA when the employee feels that the dismissal was unfair. In the event that the employee is still unsatisfied after the CCMA award, the employee would then proceed to the Labour Court for adjudication and not

vice versa.¹¹⁰⁶ This is what happens after the CCMA has referred the matter to the Labour Court.¹¹⁰⁷

4 3 The repercussions of decisions based on employer interests against employees' rights

Through illustrations derived from recent case law ¹¹⁰⁸ which deals with some aspects of decided criminal misconduct dismissal cases, it is discovered that procedural dilemmas are caused. Central to these dilemmas is the contradiction between the two engaged criminal and civil labour laws with different underlying rationales of flexibility and proportionality.¹¹⁰⁹

The difference in procedure seeking to punish employee criminal suspects, leads to objectionable outcomes considering constitutional proportionality principles. Few of these objectionable outcomes include questions of double punishment; unreasonable and onerous punishments, disproportionate outcomes and inequalities in the application of punishments on similar types of perpetrators. The cases cited below illustrate a glimpse of surmountable legal predicaments ensued by the distinction of labour law and criminal law processes dealing with employee dismissals on misconducts of a criminal nature.

¹¹⁰⁶ See the case of *Pillay v Automa Multi Styrene (Pty) Ltd* (LC) (unreported case number JS 1658/14, 9-6-2015) where an opponent argued against applicant's leap to the Labour Court before the CCMA's certification of the matter. The arguments were based on section 191 of the LRA and on section 157(4)(a) and (b) of the LRA setting the procedure that, "the labour court may refuse to determine any dispute, other than an appeal or review, if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation." Section 191 (5) of the LRA in particular requires that the applicant refer the matter to the CCMA and attempt to resolve the dispute through conciliation, or to allow a 30-day period to elapse, before the Labour Court can be approached to entertain the applicant's matter.

¹¹⁰⁷ Read *Intervolve (Pty) Ltd and Another v National Union of Metalworkers of South Africa obo Members* 2014 35 ILJ 3048 (LAC) at 160A. Per Zondo AJ & Mogoeng AJA, which amongst others held that "... [T]he wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication..."

¹¹⁰⁸ For example cases discussed below; namely *S v Mateke and Mabaso* Case no: A 120/2015 heard on the 7/6/2016 (Unreported) and *Minister of Police v RM M & Safety and Security Sectoral Bargaining Council* Case no: JR56/1(unreported)

¹¹⁰⁹ Extrapolated in chapter two.

4 3 1 The parallel nature of criminal misconduct dismissal processes

The decided cases on employee criminal misconduct are of essence in this chapter. They are discussed in order to expose that the disjointed nature of South African civil and criminal laws creates an opportunity for employers to exploit formal legal processes. It was revealed previously that labour law allows the employer to design flexible ways of investigations and enquiries. To accomplish this, the employer, for example, may invoke the use of both criminal and civil processes of investigations and discoveries. These may extend to parallel proceedings.¹¹¹⁰ Parallel proceedings are problematic by nature because they compromise due process and encourage simultaneous enforcement actions.

Across these cases, the weaknesses in labour law dealing with cases of dismissal based on criminal misconduct are exposed. Furthermore, these cases show that the disjunction between the criminal and civil law processes engaged in labour law disciplinary processes for criminal misconduct, prejudices the ultimate justice.¹¹¹¹ Through arguments based on cases referred to in this chapter, lack of effective processes countering harsh effects in due course are found to compromise rationale for fair labour practices.

¹¹¹⁰ Regarding the nature of parallel proceedings, see Coffee J C 1991 *Boston University Law Review* 193 at 194 where he acknowledges the nature of criminal law. Regarding the possibility of prejudicial processes read Cheh M M 1991 *The Hastings Law Journal* 1325. Also read Basdeo V 2013 *African Journal of International and Comparative Law* 303-326; McCastlain C J and Schooner L S 1986 *Public Contract Law Journal* 418-445; Gonzalez L G Connolly B G and Eliopoulos E 1993 *American Criminal Law Review* 1179-1220 at 1179; Hasset M J 1979 *Washington and Lee Law Review* 1049; Eckers S R 1998 *Hofstra Law Review* 109 .

¹¹¹¹ *Minister of Police v RM M & Safety and Security Sectoral Bargaining Council* Case no: JR56/14.

4 3 1 1 The South Gauteng Case of *S v Mateke and Mabaso* Case no: A 120/2015 heard on the 7/6/2016 (Unreported)

On this matter, two employees were internally investigated by the employer for theft of company funds. They then attended disciplinary hearings whereafter they were dismissed. When they appealed the employer's decision, their appeal was not successful. The employer then proceeded and instituted criminal proceedings against them. In the criminal trial, the issues were based on the very same facts as those set before the disciplinary hearing. The two employees were then charged with theft.

4 3 1 1 1 Background to the matter

On the 1st of October 2014, the employees received letters of suspension. On the 27th February 2015 the employees were informed about the disciplinary hearing. On the 30th of June 2015 the hearing for dismissal was finalised. On the 17th September 2015 they received letters of dismissal. Five days later they appealed their dismissal but failed. Second letters of dismissal were issued to them.

After the labour law sanction of dismissal ¹¹¹²was finalised, the State went back to the appellants with criminal law processes based on the same subject matter of dismissal.¹¹¹³ Almost one month later, on the 21st November 2014, they were arrested. On the 24th of November 2014, they appeared before court and lodged bail which was granted. Each one paid bail of R5000.00. On 11th December 2014, they appeared for trial, the matter was then postponed to January 2015, and further postponed to 10 February 2015. On 10 February 2015, they pleaded guilty and the matter was postponed to 27th February 2015 and then again to 20th March 2015 for sentence.

¹¹¹² They were dismissed from work for stealing money.

¹¹¹³ That they stole money from work.

4 3 1 1 2 Sentence background

At the trial, the respondents pleaded guilty to all 265 counts of fraud. They had formally confessed amidst the arrest that they had indeed defrauded the Department of Justice and Constitutional Development. They nevertheless went before a magistrate where their confession was formally recorded. They further tendered formal admissions in terms of section 112 of the Criminal and Procedural Act and the State accepted the plea from the respondents. Based on the appellant's acceptance of the formal pleas and the evidence tendered on aggravating circumstances, the court proceeded to pass sentence.

4 3 1 1 3 The sentence

Respondents were sentenced to 8 years direct imprisonment, of which five years were suspended on conditions that: -

1. Respondents are not convicted of fraud and /or any competent verdict to fraud to which the respondents are sentenced to imprisonment without an option of a fine committed during the period of suspension.
2. That the respondents are separately and jointly responsible to pay the amount of R1 442 740 to the complainant, Department of Justice and Constitutional Development as follows: -
3. Both forfeit their entire pension benefit to the State
4. Separately and jointly responsible to pay the outstanding balance not covered by the pension benefits in monthly instalments of R11 330 per month, until the amount is fully paid.

The court made the following considerations: -¹¹¹⁴

1. That respondents confessed
2. That they pleaded guilty
3. That they resigned to forfeit pension money so that they repay the stolen monies

¹¹¹⁴ Judgement unreported, court record not transcribed. Court Audio record available. Argument extracted from audio recordings of the court.

4. That they have undertaken to pay the balance difference in monthly cash
5. The court also considered the hardship, that the respondents would have a criminal record, which will remain a stigma and make it a challenge that they get jobs afterwards
6. That they have lost jobs and pension money
7. The court held that respondents showed remorse
8. That they were first time offenders
9. And considered that they had dependants; -
10. First respondent, Mr Mateke, was married, had four children, two of them were minor children, he is 47 years old.
11. He took care of his mother which is 71 years and his unemployed younger brother.
12. Second respondent had two children, one 22 and another 2 years old, she is a single mother.
13. The court considered the Zinn factors¹¹¹⁵ and the main purposes of punishment-deterrence, prevention, retribution and rehabilitation.
14. The court weighs the possibility of a suspended sentence against a suggestion by the State that the court should consider a sentence that will deter the respondents.
15. The court went on to consider the status of the respondents against the public and the impact of their acts on the employer.

The court held that the concerns by Mr Pierce, attract no criticism and took them into account; these related to the impact of the respondents' actions to their career and the effects of these actions to the employer. Then the court concluded that the respondents deserved direct imprisonment because their offence is serious; the sentence of direct imprisonment was

¹¹¹⁵ *S v Zinn* 1969 (2) SA 537 (A). the factors referred to in this case are the interests of society, the personal circumstances of the accused and the nature of the offences that have been committed.

appropriate. The court did consider the reaction of the respondents during their illegal actions; that they were willing to repay the lost money and the court held that they ought to be given an opportunity to do so.¹¹¹⁶

The State then appealed the sentence of the Magistrate Court. To sum up the following were the state's appeal arguments: -

- The sentence has no deterrent effect
- The court failed to consider that the respondents held senior positions
- That their positions were that of trust
- That the respondents defrauded their employer
- That the sentence is imbalanced, it overemphasises the element of remorse against the seriousness of the offence
- Court made a compensation order without an application from State or request from complainant
- That the court did not ascertain the tax implications on the respondent's pension funds and other fees which may be due to the department
- That the respondents did not give evidence in mitigation of sentence but conveyed their wish to pay back the money through counsel
- The Court erred in calling for evidence from the respondents as to how they were going to pay back the outstanding balance from the pension funds as they would no longer be employed.

Counsel for respondents (currently appellants) argued against the appellant's argument. She regarded the gist of the appeal by the State before the court to be based on the following: -

- Appellant emphasised that sentencing respondents to a suspended sentence instead of direct imprisonment was not legally acceptable.

¹¹¹⁶ Judgement unreported, court record not transcribed. Court Audio record available. Argument extracted from audio recordings of the court.

- He argued that the case does not follow or deviate from sentences that courts normally give, in circumstances where offenders, in positions of trust had broken the trust and stolen from the employer.
- He argued that imprisonment would be appropriate as a deterrent to would-be offenders, holding positions of trust like the respondents in this case.

Counsel for respondents categorised appellant's concerns into two: -

First, strictly sentencing-related concerns and, second, procedure-related concerns. She then considered these concerns to be raising two questions to ask. Basically, to determine if the court *aquo* erred in any way in the passing of a suspended sentence, taking into respect the above indicated considerations? Then again, whether the appeal court can entertain the appellant's procedural concerns at the appeal stage? Counsel for the employee respondents, then submitted that in South African law, suspended sentences are considered appropriate under any circumstances the court deems fit, this is particularly inferred in section 297 of the CPA. She argued that the most important part of section 297 is paragraph (1)(b), which essentially reads as follows:

[w]here a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order.

Section 297(1)(b) of the CPA simply states that the court may pass "sentence" and then suspend it. It does not specify or limit these sentences. Counsel for the employees, argued that it is fair to assume, that all sentences a court may impose are included. There is no doubt that sentences consisting of ordinary imprisonment and fines can be

suspended. This is also accepted of section 276(1)(i) imprisonment.¹¹¹⁷ In this respect counsel for respondents submitted that the court did not err in passing a suspended sentence, it had discretion to pass sentence guided by circumstances of the case in hand. She argued that in every sentence there is a requisite for a fair balance of mitigating circumstances and aggravating circumstances including an aspect of deterrence to both respondents and potential culprits.

She further argued that there is an overwhelming account of mitigating circumstances in this case, which the court would not reasonably overlook to give way to aggravating circumstances relating to the seriousness of the offence.¹¹¹⁸ South African law allows that in meting out a punishment, the court considers a punishment that suits the offender as well as the offence. Furthermore, counsel for respondents insisted that the sentence passed by the court *aquo* was appropriate due to the considerations that the court made.¹¹¹⁹

In particular, she argued that the court *aquo* did not err in considering that loss of employment had a detrimental effect on the respondents. In effect, she argued that by considering this factor, the court was able to mete out a proportionate¹¹²⁰ sentence. She supported her arguments with what happens in other jurisdictions.¹¹²¹ In short, she based herself on the constitutional provisions of section 39.¹¹²²

¹¹¹⁷ See *S v Stanley* 1996 (2) SACR 570 (A) at 575f-g. As well see Terblanche S *The Guide to Sentencing in South Africa*. 2007, 348-349.

¹¹¹⁸ Judgement unreported, court record not transcribed. Court Audio record available. Argument extracted from audio recordings of the court.

¹¹¹⁹ Judgement unreported, court record not transcribed. Court Audio record available. Argument extracted from audio recordings of the court.

¹¹²⁰ Consider Ashworth, *Sentencing and Criminal Justice* (1995) page 1.

80. As well see concerns raised on the disproportionate punishment caused by the lack of integration between criminal sanctions and employment deprivations, in Bagaric M 2004 *Journal of Criminal Law* 329-355.

¹¹²¹ Amongst others, the United Kingdom and the United States of America as well as Australia.

¹¹²² This section recommends interpretation that considers international and foreign law developments of similar concepts encapsulated in South African Law.

Quoting the decision in *Johnson v Unisys Ltd*,¹¹²³ she argued that loss of employment is a punishment as employment is valuable.¹¹²⁴ The court rejected this reasoning on the basis that the employee, by stealing from its employer, called that upon itself and therefore it is of no essence in considering loss of employment upon punishment.¹¹²⁵

Counsel for the respondents also argued that after the loss of employment due to dismissal, the employees have no prospects of employment.¹¹²⁶ It further considered that the attainment of a criminal record owing to conviction of the employees would be another further punishment.¹¹²⁷ In the midst of a different perspective of sentencing employees who had also been dismissed from their employments, counsel based her arguments on the two Australian decisions, namely, *R v Talia*¹¹²⁸ read with *R v Nuttall; Ex parte Attorney-General*.¹¹²⁹

She maintained that Australian decisions like American perspectives, give a balanced discussion of opposing hypothesis regarding the need to consider employment deprivations. Consequently, they appreciate the need to consider employment deprivations in sentencing.¹¹³⁰

The court, while rejecting counsel's arguments as "strange," insisted on the current consistent way of sentencing perpetrators of fraud regardless of whether they lost jobs or not. The court inferred that South Africa is a highly corrupt country as compared to Australia and therefore the South African

¹¹²³ [2003] 1 AC 518,539[35] per Lord Hoffmann.

¹¹²⁴ Judgement unreported, court record not transcribed. Court Audio record available. Argument extracted from audio recordings of the court.

¹¹²⁵ Judgement unreported, court record not transcribed. Court Audio record available. Argument extracted from audio recordings of the court.

¹¹²⁶ Judgement unreported, court record not transcribed. Court Audio record available. Argument extracted from audio recordings of the court.

¹¹²⁷ Judgement unreported, court record not transcribed. Court Audio record available. Argument extracted from audio recordings of the court.

¹¹²⁸ [2009] VSCA 260,[28].

¹¹²⁹ (QLD),[59] PER Muir JA (with whom Fraser and Chesterman JJA agreed). As well see legal Professional discourses in argument for the considerations, taken by the court *aquo*. For example, the discussion in Bagaric M, Xynas L and Lambropoulos V 2016 *UNSW Law Journal* Vol 39(1).

¹¹³⁰ Bagaric M, Xynas L and Lambropoulos V 2016 *UNSW Law Journal* Vol 39(1) 47 at pages 81-82 (C Employment Deprivations Should Reduce Penalty) consider page 59 regarding ensuing arguments.

law must indicate zero tolerance to employee theft.¹¹³¹ In particular, the court considered *Nicole Romey De Villiers v The State*.¹¹³²

Addressing the argument on whether the sentence should stand in the light of the decision in *Nicole Romey De Villiers v The State*,¹¹³³ Counsel for respondents argued that each case must be considered within its own circumstances. In particular, the court in Nicole's case did not consider the impact of the loss of employment on the appellant. It mainly focused on appellant's prospects of rehabilitation and the fact that appellant was gainfully employed. The Nicole' case could be relevant in this particular case to the extent that it contributes mitigation for single parents who are also care givers to minors. However, counsel for respondents still argued that even though the court *aquo* did consider that the second respondent had two children, of which one is 22 and another 2 years old and that she is a single mother, it failed to consider the issue of loss of employment as enough mitigation to allow the court to budge from imposing direct imprisonment.

This factor was not fully thrashed out because the best interest of the minor child was never fully dealt with. Counsel therefore submitted that the circumstances of the second respondent as a caregiver to a minor child should appeal to the court never to consider direct imprisonment for the second respondent. This aspect puts the court *aquo* suspended sentence at stake as far as it would ultimately amount to direct imprisonment at the lapse of one or the other condition.

In conclusion, counsel for respondents argued that, the arguments raised on behalf of the state, that the court *aquo* exercised its penal discretion irregularly, unreasonably, improperly and in an unbalanced way is

¹¹³¹ This perspective is without the realisation of the unreasonableness in punishing the same person more than once on the basis of same issues. This is forbidden in the common law principle *Nemo debet bis vexari pro una et eadem causa*, which means nobody, may be harassed with the same offence / case twice.

¹¹³² (20367/2014) [2015] ZASCA 119; 2016 (1) SACR 148 (SCA); [2015] 4 All SA 268 (SCA) (11 September 2015).

¹¹³³ (20367/2014) [2015] ZASCA 119; 2016 (1) SACR 148 (SCA); [2015] 4 All SA 268 (SCA) (11 September 2015).

unfounded. She pleaded that the appeal should be dismissed. Further, she pleaded that the court varies the sentence of the court *aquo*. What the appeal court ought to do was to vary the sentence of the court *aquo* by removing the suspended sentence, counsel argued. Furthermore, the appeal went a step further to argue that court ought to vary the court *aquo* sentence by removing the order that respondents pay the remaining balance.

It was further argued by the appellant-employer that the appeal court would again remit the matter back to the Regional Court for that court to make a proper consideration regarding the proper calculation of monies which respondents lost to State, as compensation for the loss that the State incurred.¹¹³⁴

It was further argued on behalf of the employees accused, that the court ought to consider the substance of court *aquo*'s net sentence, and that even though it is a trend that South African Jurisprudence in matters of this nature¹¹³⁵ leans towards direct imprisonment, the consideration of *the effect of employment law sanctions*, which are tantamount to punishment, bears a similar net effect with criminal punishment.¹¹³⁶

At the instance of State, the court required not to bother about the calculation of monies still owed to the State by the respondents after the pensions were paid in. The State vouched to use its administrative ways.¹¹³⁷ Consequently, the court never delved into this issue. The court upheld the appeal and set aside the Magistrate Court's decision. That decision was substituted with the following sentence: -

¹¹³⁴ Judgement unreported, court record not transcribed. Court Audio record available. Argument extracted from audio recordings of the court.

¹¹³⁵ Where employees stole from their employers.

¹¹³⁶ Argument extracted from audio recordings of the court. No reported judgment nor transcribed court proceedings.

¹¹³⁷ Here the state was referring to the invocation of the Asset Forfeiture laws. This law however is highly criticised by its double jeopardy effects.

- One-year direct imprisonment in terms of section 276 1 (i) of the Criminal Procedure Act to operate within 7 days from the date of judgment
- The court threw out respondents' counsel arguments and commented: -

It considered the cited Australian jurisprudence as "strange."¹¹³⁸

Not much was said in the reasoning of the court as to why the cited authorities were thrown out.

4 3 1 1 3 1 Critical Analysis

The *Mateke* matter is just the tip of the iceberg to unreported matters of criminal law nature which first began as an employee dismissal matter before employer hearings and ended up as a criminal trial matter before criminal courts. The two employees, criminally accused, initially began as employee criminal misconduct suspects. They were investigated for dismissal purposes and later the investigation for their criminal trial had taken over. They were investigated twice for one crime. They were arraigned and charged before the employer hearing for dismissal and found guilty of theft and a punishment of dismissal meted against them. Consequently, before the criminal court, they were punished again. The Magistrate Court had granted a suspended sentence in consideration that they were already punished through loss of employment. The magistrate considered the loss of employment as a mitigating factor hence the reason that the Director of Public prosecutions had appealed requesting that the High Court throw out the Lower Court judgment and impose direct imprisonment.

The first criminal investigation by the employer did not follow the fair trial processes entrenched in section 35 of the Constitution read with the CPA. The second investigation, even though purported to follow fair trial

¹¹³⁸ Bearing the fact that no written judgment was given, it is hard to grasp the court reasoning.

processes, was already tainted by unfair investigation procedures carried out previously by the employer. This case exposes a clash between employer flexibility-based processes of investigation and criminal justice proportionality-based procedures. Where these take place simultaneously they breed unfairness and therefore injustices.

In this case, the court missed an opportunity to develop the law from unjustifiable to a justifiable perspective. If the court could have taken an approach that unites criminal law punishment and civil employment law sanctions as it was suggested by respondents' counsel, the problems of double punishment could have been eradicated. Compared to ordinary cases of fraud, the respondents' punishment comes out onerous and disproportionate to criminal justice. This scenario amounts to inequality of sanctions, when compared to other fraudster employees who are punished twice as much.¹¹³⁹ The court ought to have considered that ahead of the ensued injustices in the sentencing of the respondents, the worst thing is that discord between criminal sanctions and employment deprivations reduces the rehabilitation prospects of offenders.

4 4 *The Case of Minister of Police v RM M & Safety and Security Sectoral Bargaining Council Case no: JR56/14(Unreported)*

In this matter, an employee who was alleged to have raped his minor daughter several times,¹¹⁴⁰ a few years ago, was dismissed by his employer based on committing a criminal misconduct.

This matter is understood to expose employer's basis for substantive fairness of the employee's dismissal to have been evidence submitted at an enquiry which was aimed at proving the guilt of the employee in that he perpetrated the acts.

¹¹³⁹ Consider the argument against onerous punishment of employee criminal suspects in Bagaric M 2004 *Journal of Criminal Justice* August Vol 68(4) 329-355 at page 332.

¹¹⁴⁰ The alleged facts of the incidences were heart-breaking and damaging to the alleged victim-his daughter.

The employer understood that, if the allegation is proven to have been true, the employee could no longer be an employee of the South African Police Service (SAPS). The continuance of the employee criminal perpetrator as the employee of SAPS would damage the dignity of the police service.¹¹⁴¹

The enquiry was held under a flexible procedure even though it sought to prove that the employee indeed committed the alleged criminal acts of sexual assault against his daughter. Constitutional observations enquired for fair criminal persecutions were never followed. The witnesses before this enquiry, for example, were never sworn. It was the prevailing understanding that these witnesses knew that they were supposed to tell the truth.¹¹⁴²

The internal proceedings ran simultaneously with criminal trial of the employee. Before the criminal trial could come to completion, the employee had taken the decision to take on the employer for arbitration.

It transpired that the complainant as the key witness refused give evidence at the arbitration. It was alleged that she was traumatized by the experience of giving evidence before the internal employer enquiries.¹¹⁴³ At this demise, the employer gave transcripts of the internal enquiry evidence. These were therefore classified hearsay evidence governed by the South African Law of Evidence Amendment Act 45 of 1988 (LEAA). It is this law that introduced and defined a specialized field of law of hearsay evidence as a development of common law aspects of hearsay evidence.

From the employer's side it was argued that the records were admissible in the best interest of justice in terms of section 3(1)(c) of the LEAA.¹¹⁴⁴ The arbitrator was not convinced given that the determination could be based on this evidence alone.

¹¹⁴¹ See para 2 of the judgment.

¹¹⁴² See the comment of the Labour Court in para 26 of the judgment.

¹¹⁴³ Para 48 and 50 of the judgment.

¹¹⁴⁴ See para 6 of the judgment, the employer applied that the record be admitted in terms of the LEAA.

The arbitrator then decided against the handed evidence. In light that there was no other independent evidence that the hearsay evidence seeks to pass through, the commissioner found it difficult to determine substantive fairness alleged by the employer. As far as the commissioner was concerned, there was no evidence to weigh. Prior to the commissioner, there was no corroborating evidence except the transcripts.¹¹⁴⁵

At the review of the arbitrator's award, the Labour Court, held against the arbitrator. The disagreement used for its decision, was that the transcripts were handed in as hearsay evidence. Integrally, despite the employer's annunciation on the guilt of the employee based on the led evidence, the Labour Court considered the contents of the transcripts of the evidence led in determining the criminal guilt of the employee substantive evidence. Thus, the court inferred that the content of evidence matters and not the purpose for which it was sought.¹¹⁴⁶

At the second turn, the Labour Court found that the employee ought to have taken a stand and rebut the *prime facie* evidence against him. It is understood that the court referred to the transcripts to have established *prime facie*¹¹⁴⁷ evidence of the employee's perpetration of criminal acts inferred against him.

Against the decision by the arbitrator that the evidence tendered was of minimal weight, the Labour Court held that it was correct that the untested hearsay evidence was admitted by the arbitrator.¹¹⁴⁸

Whilst ignoring the law regarding that the process of arbitration must be a *de novo* hearing of the parties' case, the Labour Court considered that it was an irregularity that the commissioner decided that the transcript had a minimal evidential weight.

¹¹⁴⁵ See para 33 of the judgment.

¹¹⁴⁶ See para 38 of the judgment.

¹¹⁴⁷ The court was actually calling for the alleged criminal perpetrator to incriminate himself.

¹¹⁴⁸ Para 35 of the judgment. I do not agree with this perspective because it is turns against justice it seeks to met. Law of evidence have defined principles regarding admissibility of hearsay evidence.

The court went on to say that the commissioner “did not seem to realize that the transcripts were of *no ordinary hearsay*.”¹¹⁴⁹ The court held that the transcript was hearsay evidence of a *special type*.¹¹⁵⁰

The court’s understanding inscribes that the commissioner ought to have traversed the transcript and investigated what transpired in the enquiry. While condoning the informalities that happened at the enquiry and understanding that the enquiry determinations are based on informal procedure even when dealing with matters of a criminal law nature, the commissioner ought to have read the transcript and evaluated it to be of weight and can base a decision that the employee was fairly dismissed.

- The court considered that the transcripts were of bi-lateral value.
- That they were a comprehensive record of earlier proceedings in which the complainant’s evidence against the employee was indeed corroborated by independent witnesses.
- That the substantiation was tested through cross examination.
- That the employee’s defense was ventilated and exposed as being plausible.

What the court suggested ought to have been done, was basically to overlook established principles of evidence, regarding the admissibility of hearsay evidence, regarding fewer that the transcripts were submitted as hearsay evidence in light of the interest of justice.

Even though the Labour Court did not ultimately decide on the matter but remitted it to the commissioner for a fresh arbitration, it left an instruction¹¹⁵¹ and understood that its instruction introduces a departure from the normal guidelines of the law on how hearsay is weighed. It held that,

Since this may be a departure from the norm in how hearsay is weighed, I take this opportunity to set out a few guidelines on when, in

¹¹⁴⁹At Para 37.

¹¹⁵⁰ At Para 37.

¹¹⁵¹ It referred to this instruction as the new guideline. At para 45.

arbitration proceedings conducted in terms of the LRA, a single piece of hearsay, such as a transcript, might constitute prima facie proof of an allegation. The hearsay should:

be contained in a record which is reliably accurate and complete;

be tendered on the same factual dispute;

be bilateral in nature. In other words, the hearsay should constitute a record of all evidence directly tendered by all contending parties;

in respect of the allegations, demonstrate internal consistency and some corroboration at the time the hearsay record was created. For example, the transcripts read as a whole provide corroboration via D and RM, for K's evidence that she became pregnant at age 14 while living under her father's roof. RM's letter to K about expecting favours in exchange for sex was further corroborated by S;

show that the various allegations were adequately tested in cross-examination. For example, the transcripts record not only K's allegations but also RM's attempts to discredit them;

have been generated in procedurally proper and fair circumstances. For example, the internal hearing that generated the hearsay records was run in a scrupulously fair manner by Snr Supt Matabane, with RM free to conduct his defence as he wished.¹¹⁵²

Through this new guideline, South Africa will be adopting a unique way on how to weigh hearsay evidence. This approach is unique to South Africa and has never been practiced elsewhere in the world.

4 4 1 Critical Analysis

The newly decided guidelines, single out labour matters and define a unique and new way of admitting hearsay evidence. This newly created approach to admitting hearsay symbolises that the Labour Court did not appreciate the negative impact that this new principle has on the well-established law of evidence principles.¹¹⁵³

Clearly from these instructions the arbitration need not follow legislated principles of evidence. Similarly, even in the light of principles underlying criminal condemnation, it can be argued that it is impossible, if not very difficult, to exclude the purpose of evidence from its content as the court

¹¹⁵² At para 45.

¹¹⁵³ On the rationale of law of evidence, read Schwikkard and Van der Merwe *Principles of Evidence* 4; about the risks engaged in the ignorance of evidentiary precautions, read Monyakane MMM **2015** *Obiter* 136-149.

suggests. In pursuit of what the court suggested that the purpose of evidence be excluded from its content, it is possible that the guilt of an alleged criminal perpetrator be proved using informal ways which are full of irregularities in pursuit of employer's grounds for fair dismissal.

These irregularities would be ignored regardless of their prejudicial nature on the employee suspected of criminal misconduct. It is argued that the Labour Court indirectly acknowledges that the objective of the inquiry was to establish the guilt of the employee without which determination, it could not found substantive fairness.

In the long run, this decision acknowledges disproportionate justice against the employee. If the rationale for criminalisation was considered in this matter, the court could have appreciated every ensuing injustice and thus applied mitigating precautions. This can only be attained by breaking the walls between civil and criminal justice.

4 5 Conclusion

Using chapter three as background, this chapter explained that the adoption of the principle of implied breach of trust between employer and employee emanating from common law¹¹⁵⁴ and now encapsulated in jurisprudential underpinnings of dismissal hearing processes, promotes the idea that the employer has flexibility in determining disciplinary hearing processes. It has shown that this understanding was practicalised in the LRA disciplinary hearing processes for the dismissal of employees, who committed criminal misconducts. It was found out that the practice did not exclude criminal misconducts as matters of criminal law nature in light that such matters ought to observe criminal procedure-based fairness entrenched in section 35 of the Constitution. This chapter analysed that in pursuit of flexibility, employers feel not bound by the prescripts of criminal justice and

¹¹⁵⁴ Discussed in chapter two at part 2 2 4 2 dealing with the theory of flexibility and its extent in criminal misconducts discipline.

consequently lose sight of the holistic application of constitutional justification demands.¹¹⁵⁵

The disregard of constitutional human rights-based justification was observed to lead to absurd results. The extent of employer criminal investigations and subsequent disciplinary hearing processes were deemed informal and against formal processes proscribed in the CPA. This chapter ultimately exposed that the informal employer disciplinary hearing flaunts the essentialities of proportionality mandated in matters of criminal law nature.¹¹⁵⁶ This circumstance was analysed to have culminated in multiple injustices for employees subjected to employer criminal investigations and their subsequent disciplinary hearings.

In this chapter, the intrinsic nature of employer flexibility in dismissals of employees who have committed criminal misconduct was dissected. The systematic processes of hearing for dismissal were explained. It was discovered that these processes do not observe principles of proportionality embedded in criminal law formalities. In so doing, employee's rights as criminal suspects are greatly, if negatively, affected. It was also discovered that there are uncertainties in disciplinary hearing processes. It was as well discerned, that these processes pursue progressive discipline perspective without differentiation of the nature of matters in dispute. As shown in chapter two, progressive discipline has its foundation on the theory of flexibility.

This chapter opines that, to a larger extent, flexibility gives leeway to maintaining the status quo of the imbalanced master and servant principle. While maintaining its upper hand in the relationship, since the employer cannot simply dismiss the employee, the employer would hold onto to satisfying *audi alterum partem* without extending to the need to satisfy the second leg of natural justice—*nemo iudex in propria sua causa*.¹¹⁵⁷

¹¹⁵⁵ Entrenched in section 35 of the constitution.

¹¹⁵⁶ Explained in chapter two at part 2 2 4 1 dealing with the theory of proportionality and its extent of application in criminal misconduct discipline.

¹¹⁵⁷ No man shall be judged in his own cause, the rule against bias.

As indicated in chapters one, two and three, the employer cannot proceed to such an extent because of the informal nature of the disciplinary proceedings, short of formal processes needed in complying with the second leg of natural justice. It is mandatory that in the attempt to satisfy the *audi alterum* principle requirement, the employer must have interacted with the employee criminal suspect even at the peril of sacrificing individual employee rights as a criminal suspect.

It was observed in this chapter that in most cases, where a misconduct is of a criminal law nature, the employee ends up in self-incrimination ventures to putting out their version of the issues. After the employee has been found guilty of perpetrating misconduct by the employer, the last element of substantive fairness subsequently determines an appropriate and fitting disciplinary sanction from a range of warnings to dismissal.

In the attempt to establishing substantive fairness, the employer ought to have engaged in fair evaluation of the available facts. It transpired in this chapter that the processes used to determine whether the employee suspect actually committed the criminal misconduct are not close to observing fairness principles entrenched in section 35 of the Constitution because they are based on the flexibility of the employer's decision. Concisely, they invoke specialised procedures interlocked between civil and criminal procedure.

At the centre is the pursuit to establish as to whether there is a breakdown of trust between the employer and employee while trampling on entrenched section 35 fairness rights for employee suspects of crime.¹¹⁵⁸ Goddard, writing from the New Zealand perspective, observed a similar interaction of legal processes to ensure a "tension."¹¹⁵⁹

In line with this observation, this chapter has discovered that the nature of employer disciplinary hearing proceedings causes a clash in procedure. They bear some nature of civil procedural steps in some respects; in

¹¹⁵⁸ Per section 35 of the Constitution.

¹¹⁵⁹ Goddard J 2011 *Canterbury Law Review* 251-282, at 251.

another respect they purport to be following criminal procedural steps and yet not concomitantly so. The employer investigates the criminal misconduct and therefore assumes the position of trained police investigators.

The employer devises their own investigation processes and not CPA-mandated investigation principles. These are normally informal; laissez faire and hardly take constant civil procedure into account nor formal constitutional section 35¹¹⁶⁰ oriented processes in the CPA. It was found that employer processes are hence complex proceedings, showing intertwined characteristics mixing civil trial processes with civil application processes and some observance of criminal procedure. The employer is at liberty to pick and choose what abides with the protection of flexibility-based fairness which is in effect not easily determinable. It is not a constant procedure.

It was found that employer flexible processes are not as definite and straight forward as criminal procedure, hence difficulty to abide with constitutional justification. They may follow civil procedure processes of discovery as opposed to criminal investigation processes. They do not involve legal expertise; it is the discretion of the employer as to whether the employee would need a legal representative. Their standard of proof is on a balance of probability and not beyond a reasonable doubt just as much as it happens in criminal procedure. Unlike under criminal procedure, employer processes do not observe the rights of criminal suspects.

Both civil and criminal procedure processes will ultimately condemn the perpetrator. Dismissed employees like convicted persons do not find jobs easily. They both have slim prospects of employment. Dismissed employees may still be prosecuted¹¹⁶¹ and the possibility that the unprocedural collection of evidence may be used in the criminal trial is very high as there are no laws restricting the exchange of information between

¹¹⁶⁰ Of the Constitution.

¹¹⁶¹ Consider the case of *Hollington v F Hewthorne & Co Ltd* [1943] 2 ALL ER 35

the employer and the police. The criminal trial and dismissal hearings are attached in some respects, especially for the benefit of the employer.

They are however detached when it comes to the employee benefit. Even if the employee is acquitted in the criminal trial that does not guarantee employee's reinstatement. However, the employee conviction in a criminal trial can lead to automatic dismissal without a disciplinary hearing. Underlying these clashes is the ensuing conflict between establishing employee's breach of trust and respect of entrenched rights of employee criminal suspect in section 35 of the Constitution. This conflict in legal principles poses the need to venture through the possible solutions.

The next chapter explores international jurisprudential perspectives on the tension between the pursuit of employee breach of trust and the need to observe employee criminal suspects rights. Within the extent and limits of this thesis, namely how constitutionally justifiable is the employer's investigations and disciplinary hearings on employee criminal misconducts, the examination in the next chapter is limited to available examples pertaining to the interconnections between criminal law fairness and employment law.

Chapter Five

The adoption of selected commonwealth countries' application of employee criminal suspect's right against self-incrimination in terms of section 39(1) of the South African Constitution

5 1 Introduction

In terms of section 39 (1) of the Constitution, the interpretation and application of the law in South Africa must consider international and foreign law. It is mandatory that international law is considered while it can be in accordance with choice that foreign law is considered for the justification of judicial interpretation of any South African law. In light of benefits that South Africa would attain, if it emulates other commonwealth states, in respecting employee criminal suspect's rights' against self- incrimination, it is submitted that it is mandatory that South Africa reinterprets labour law employer investigative and dismissal processes for employee criminal suspects along the lines of other commonwealth states' jurisprudence.

The international literature to refer to, has not yet developed into an established area of research. There is, however, an example of a development addressing the area of concern in this thesis. This development concerns the application of the right against self- incrimination in employment related justice. The fact that it is taking place in the commonwealth states, which were identified in chapter one and three as having similar common law principles of justification to South African constitutional demands for justification raises hope for development of labour law in South Africa.

Since the right against self-incrimination intersects principles of fairness entrenched in section 35 of the Constitution, discussed in chapters one, two, three and four, the concerned literature from the identified common law

jurisdictions is found important to form a ground and therefore a starting point for a practical eradication of the identified problem for the current study. It was found that South Africa needs to develop a law interacting labour law and criminal law so that it does away with the divide between section 23 and section 35 constitutional fairness.

The application of the section 35 right against self-incrimination, in labour law related matters of a criminal law nature, which traditionally only applies in criminal law matters and is identified as a huge step of related labour law development.

The problems experienced in South African labour law regarding the clashes between the pursuit of employee breach of trust and the need to observe employee criminal suspects' rights were apparent in the United Kingdom, Australia, New Zealand and United States of America before the right against self-incrimination was introduced in employment law. The United Kingdom, Australia, New Zealand and United States of America jurisprudence expose that these states went through the same experiences as South Africa. However, these jurisdictions have remedied the situation through various measures and strategies by introducing the application of the right against self-incrimination in employment law.

This chapter will show how the United Kingdom, New Zealand and United States of America jurisdictions developed jurisprudence dealing with criminal misconduct dismissals to the benefit of employees criminal misconducts.¹¹⁶² It will show that in these jurisdictions, negation of the principle against self-incrimination is opposed and employer investigations and disciplinary hearings respect the fairness principles engaged in matters of criminal law nature.¹¹⁶³ These jurisdictions operate in a perspective that is different from the current South African labour law perspective discussed in the previous chapters and yet they have a similar common law which

¹¹⁶² The United Kingdom; New Zealand and United States of America.

¹¹⁶³ All proportionality-based principles come into play once the employee invokes the right against self-incrimination. Consequently, the challenges explained in chapter four to be aligned with flexibility-based processes are remedied.

embraced principles of natural justice including the right against self-incrimination.

It was earlier explained that respect to the twin principles of natural justice facilitates the enforcement of the principles underlying the major principle of proportionality. The principle of proportionality was found¹¹⁶⁴ to be the backbone principle in dealing with criminal misdemeanours such as acts categorised as criminal misconduct in labour law.¹¹⁶⁵ It will be exposed in this chapter, that within their employment laws for dismissals of employee suspects of criminal misconducts, the United Kingdom, New Zealand and United States of America perspectives have adopted the principle of fairness embraced in criminal trials. They observe principles underlying section 35 of the South African Constitution.

It will be recognised from this exposure that employee dismissals in these jurisdictions make the nature of issues the focus when choosing applicable law.¹¹⁶⁶ In the end, it will be realised that the approaches of these jurisdictions defy the practice followed in South African employee dismissal jurisprudence and mirror the arguments raised in this thesis against the current South African dismissal practice in this thesis. Further, that they exemplify the constitutional objective anticipated in section 23(1) and section 8 read with sections 33, 35 and 39 of the South African Constitution. At the centre of the uncovered developments was the observance of the principle that no man shall be judged in his own cause. It is this principle that enshrines the right against self-incrimination in South Africa discussed in chapters two and three.¹¹⁶⁷

The evolution of the right against self-incrimination principle in the New Zealand, United States of America and United Kingdom jurisdictions

¹¹⁶⁴ Refer to chapters two, three and four of this thesis.

¹¹⁶⁵ Refer to chapter two para 2 1 1 1 dealing with the definition of criminal misconducts in labour law.

¹¹⁶⁶ An exposure initially proposed to be practiced in South African Law by the Constitutional Court, per Moseneke J in *Thebus v S* 2003 (10) BCLR 1100 at 1121 para 54.

¹¹⁶⁷ See para 3 2 6 on Constitutional principles underlying investigations of suspects of criminal acts.

was remarkable. It first came as a common law privilege before it was a statutorily recognised law principle. It ultimately became a protected right against self-incrimination.¹¹⁶⁸ It was earlier applied clumsily before it could be elevated to a recognised individual right. In the matter of *Palko v State of Connecticut*¹¹⁶⁹ for example, the application of this principle was undermined by the philosophy of the day. The court expressed the skepticism within which this principle was regarded when it held that self-incrimination immunities are capable of being lost without affecting the fiber of justice. The court also expressed doubt regarding justice amid torturing perpetrators.

5 2 The development of the right against self-incrimination in the United States of America.

The United States' interpretation of the right against self-incrimination is up to the current times undergoing "expansion of scope and practical effect."¹¹⁷⁰ Even though the wording of the Fifth Amendment clause is direct and simple, it transpires to be overwhelming by nature. Its "profound effect"¹¹⁷¹ is exposed by the United States of America judiciary. The courts warned that this clause ought not to be applied "narrowly or begrudgingly."¹¹⁷² These courts remarks indicated that a narrow treatment was tantamount to undermining the importance of this principle in law in conflict to treating it as a historic relic and therefore "ignoring its purpose."¹¹⁷³

The United States of America vouches for a wide interpretation. It interprets privilege against self-incrimination as a constitutional right capable of "sustaining growth and encompassing new circumstances as

¹¹⁶⁸ Pittman C R *The Colonial and Constitutional History of Privilege* 71; Trainor A S 1994 *FILJ* 2139-2186; Langbein J H 1993-1994 *Mich L Rev* 1047-1085; MacCulloch A 2006 *Legal Studies* 211-257.

¹¹⁶⁹ 302 US 319 (1937) at 325–6 per Cardozo J.

¹¹⁷⁰Theophilopoulos above note 869.

¹¹⁷¹Theophilopoulos above note 869.

¹¹⁷²Theophilopoulos above note 869.

¹¹⁷³Theophilopoulos above note 869.

they arise.”¹¹⁷⁴ A couple of principles accommodating wide application of the right against self-incrimination in the United States of America entail that;

*[f]irst, all invocations of the privilege must be liberally interpreted, always in favor rather than against the claimant.*¹¹⁷⁵

*Secondly, an invocation of the privilege is not dependent on a particular choice of words and no specific ritual formula is required.*¹¹⁷⁶

*Third, the privilege may be asserted in all proceedings, civil or criminal, administrative or judicial, investigatory or adjudicatory.*¹¹⁷⁷

*Fourth, waiver of the privilege must be made voluntarily, knowingly and intelligently.*¹¹⁷⁸

Fifth, the accused’s privilege in the courtroom (i.e. the trial right to silence) is an absolute privilege, whereas the witness privilege against self-incrimination is a relative one which may be invoked on a question-to-question basis.

*Sixth, once the privilege has been claimed, no evidentiary use may be made of the suspect’s pre-trial silence during custodial interrogation or of the accused’s silence or failure to testify during the trial.*¹¹⁷⁹

The application of these principles facilitates effective protective mechanisms in matters of criminal law nature. Their application is especially useful at the demise of flexibilities entailed in employment law which is semi contractual in nature.

¹¹⁷⁴ *Gompers v United States* 233 US 604 (1914) at 610, the interpretation of constitutional provisions is to be gathered ‘not simply by taking the words and a dictionary but by considering their origin and the line of their growth.

¹¹⁷⁵ *Hoffman v United States* 341 U.S. 479 (1951) at 486 and *Counselman v Hitchcock* 142 U.S. 547 (1892) at 562 hold that ‘the privilege is as broad as the mischief against which it seeks to guard’. *Counselman* was partly overruled by *Kastigar v United States* 406 US 441 (1972) at 455.

¹¹⁷⁶ *Quinn v United States* 349 US 155 (1955) at 162 notes that no magic language is required to assert the privilege which is effectively invoked by any language which the court should reasonably be expected to understand as an attempt to claim the privilege.

¹¹⁷⁷ *Kastigar v United States* supra note 30 at 444.

¹¹⁷⁸ *Miranda v Arizona* supra note 11 at 444 citing *Escobedo v State of Illinois* 378 US 478 (1964) at 490n14.

¹¹⁷⁹ See Theophilopoulos C (2006) 123 (3) SALJ 516. Footnotes included.

5 2 1 The United States of America extension of the principle against self-incrimination to civil law

In *McCarthy v Arnstein*,¹¹⁸⁰ privilege against self-incrimination was extended to all cases, both criminal and civil. All civil matters that solicited an investigated individual to be subjected to criminal liability called for the invocation of individual privilege against self-incrimination. The case of *Andresen v Maryland*¹¹⁸¹ in pursuit of the *McCarthy principle*, unleashed a new perspective in the United States of America and the need for the protection of subjects of investigations. The Star Chamber perspectives compelled subjects of investigations to confess their guilt and incur compulsory incrimination.¹¹⁸² Historically, privilege against self-incrimination was concerned with the protection of incriminating documents or coerced incrimination.¹¹⁸³

Following *McCarthy* and *Andresen*, it was decided in *Butterfield v State*¹¹⁸⁴ that, the application of the Fifth Amendment that no person can be compelled in any *criminal case* to be a witness against himself, is extended to any civil proceeding—be it administrative, judicial, investigatory or adjudicatory. In order to assert this privilege, it was held, what is of concern is the *questions asked* and not the *type of proceeding*.

5 2 2 The application of the Fifth Amendment clause in employer criminal investigation and disciplinary hearings

The system marshalled in the United States of America distinguishes between classes of investigations not done by law enforcement agencies. These include investigations where the incident under investigation may be

¹¹⁸⁰ 266 U.S. 34 (1924).

¹¹⁸¹ 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976).

¹¹⁸² *Andresen v Maryland* 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976)

¹¹⁸³ *Andresen v Maryland* 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976)

¹¹⁸⁴ *Butterfield v State*, 992 S.W.2d 448 (Tex. Crim.App.1999).

criminal in nature and those where the incident is a purely civil matter. More caution is taken when dealing with potentially criminal matters.

The United States of America precedent is based on the application of the Fifth Amendment to the United States Constitution which states that: 'No person shall be compelled in any criminal case to be a witness against himself.' In *Murphy v Waterfront Commission of New York Harbor*,¹¹⁸⁵ it was held that the application of this principle was extended to all States by the Fourteenth Amendment to the United States Constitution. As *Andresen v Maryland*¹¹⁸⁶ reveals, this principle does away with the procedure that compels subjects of investigation to admit their guilt leading to compulsory incrimination from the suspect's own testimony and personal records. The application of this principle does not discriminate between criminal and civil proceedings if the suspect or the witness precludes self-incrimination.¹¹⁸⁷ The assertion of this principle does not depend on the nature of the proceedings. It can be invoked in civil, criminal, administrative or judicial, investigatory or adjudicatory proceedings. The nature of the protection is not discriminatory on the process; it all depends on the question.¹¹⁸⁸ The Supreme Court cases of *Garrity v. New Jersey*,¹¹⁸⁹ and *Gardner v. Broderick*,¹¹⁹⁰ decided against the involuntary waiver of the constitutional right to silence by virtue of employment. The court held that the objective of this constitutional right is the protection of individuals from coerced self-incriminating testimony. With particular reference to administrative criminal investigations, the court held that even though it is not compulsory to caution an employee of this right before testifying, the employee must be given immunity against self-incriminating testimony in future criminal trials,

¹¹⁸⁵ 378 U.S. 52 (1964). Followed in *M alloy v. Hogan*, 378 U.S. 1 (1964); *Spevack v. Klein*, 385 U.S. 511 (1967) and *Garrity v. New Jersey*, 385 U.S. 493 (1967).

¹¹⁸⁶ 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976).

¹¹⁸⁷ *McCarthy v Arndstein* 266 U.S. 34 (1924).

¹¹⁸⁸ *Butterfield v State*, 992 S.W.2d 448 (Tex. Crim.App.1999).

¹¹⁸⁹ 385 U.S. 493 (1967).

¹¹⁹⁰ 392 U.S. 273 (1968).

if the employee happens to give any testimony during the internal investigation.¹¹⁹¹

5 2 3 South African fair dismissal perspective for employee criminal suspects compared to the United States perspective

Compared to the United States, which shares similar foundational constitutional perspectives on fairness, South African labour law is still lagging. Unlike the United States of America, South Africa does not offer or enforce constitutional protective measures for suspects of crime, where such suspects are employees appearing before a disciplinary hearing. The law leaves employers with wide and uncontrolled discretion. As seen earlier in South Africa, the epitome of dismissal based on criminal misconduct is employer discretion regarding the extent to which the employee has breached the trust the employer had on the employee.

The employer needs not rely on statutorily specified legal rules in establishing reasons as to why the employee could be said to have breached employer trust. Mere allegations of criminality suffice; they need not be tested as constitutional criminal justice vouches. Unlike in the United States of America, South African labour law dismissals, disregard the application of the rights to remain silent and against self-incrimination even where criminal misconducts are an issue. It is seen from above that the United States of America has defined jurisprudence regarding the application of the right to silence even in employer criminal investigations.¹¹⁹²

The relevance of the American jurisprudence cannot be denied as far as its persuasive application in South Africa. The South African fundamentals on

¹¹⁹¹ *Garrity v. New Jersey* 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lachance v. Erickson*, 118 S.Ct. 753, 139 L.Ed.2d 695; *Bryson v. United States*, 396 U.S. 64; *U.S. v. Wong*, 431 U.S. 174; *U.S. v. Dunnigan*, 507 U.S. 87; *Hale v. Henkel*, 201 U.S. 43; *Baxter v. Palmigiano*, 425 U.S. 308. The list is not exhaustive.

¹¹⁹² To name a few, see the reasoning in *Garrity v. New Jersey* 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lachance v. Erickson*, 118 S.Ct. 753, 139 L.Ed.2d 695; *Bryson v. United States*, 396 U.S. 64; *U.S. v. Wong*, 431 U.S. 174; *U.S. v. Dunnigan*, 507 U.S. 87; *Hale v. Henkel*, 201 U.S. 43; *Baxter v. Palmigiano*, 425 U.S. 308.

the rights to remain silent and the right against self-incrimination evolved from the same perspective as the American perspective. Theophilopoulos observes:

Although the South African silence principle has been elevated to the status of a constitutional right, it is to all intents and purposes the evolutionary product of a utilitarian English common-law rule,¹¹⁹³ and therefore likely to be influenced by English statutory developments.¹¹⁹⁴ However, it should be noted that an essential element of the right to silence entrenched in s 25(3)(d) of the Republic of South African Constitution Act 200 of 1993 (interim Constitution) uses much the same language as the American Fifth Amendment, as do several of the key terms incorporated into s 35(3)(j) of the Constitution of the Republic of South Africa, 1996 (the 1996 Constitution).^{1195 1196}

It would, therefore, not be so far-fetched to borrow the *nitty-gritty* of the right-to-silence application in employer dismissals from American jurisprudence. The difference in the application of this principle between South Africa and the United States of America is appreciated. According to the South African approach, the right to silence has two distinct rights, namely the right to silence which applies in pre-trial stages¹¹⁹⁷ and the right against self-incrimination which applies as privilege during the criminal trial.¹¹⁹⁸ American jurisprudence combines the right to silence and the right against

¹¹⁹³See Theophilopoulos C 2003 SLR 161.

¹¹⁹⁴ South African Law Commission *Simplification of Criminal Procedure — A More Inquisitorial Approach* South African Law Commission Discussion Paper 89 Project 73 (April 2001) suggests amending the right to silence along the lines set out by the English Criminal Justice and Public Order Act 1994. See Theophilopoulos C (2002) 15 SACJ 321.

¹¹⁹⁵Section 25 of the interim Constitution, particularly s 25(3)(d): ‘. . . and not to be a compellable witness against himself or herself’. See also s 35 of the 1996 Constitution, particularly s 35(3)(j): ‘not to be compelled to give self-incriminating evidence’.

¹¹⁹⁶ Theophilopoulos above note 869 at 516–517. Footnotes included.

¹¹⁹⁷ See Theophilopoulos C 2003 2 SLR at 161, who explains that this becomes obvious not so much from a theoretical perspective, but when these rights are invoked in practice.

¹¹⁹⁸See Theophilopoulos C 2003 2 SLR 161, who explains that this becomes obvious not so much from a theoretical perspective, but when these rights are invoked in practice.

self-incrimination as one silence principle. It applies this principle in State and private office related investigations.¹¹⁹⁹

In the light of the South African right to administrative justice which insists that similar principles of fairness, justiciability and reasonableness apply in justifying administrative action, regardless of whether administrative action emanates directly from the State or from private entities, it is reasonable to argue that the American jurisprudence's¹²⁰⁰ explanation of the application of the right to silence as far as the exercise of State power is concerned, can well be used to explain the scope of the application of rights against self-incrimination and silence on private power upon which employer criminal investigations are based in South Africa.

In the light of the cautious approach that the United States of America adopted and bearing the fact that the Fifth Amendment emulates South African constitutional concerns expressed in section 35 of the Constitution, it is important to ponder and adopt a new perspective for South Africa. If you look at the positive consequences that brought the extension of the privilege against self-incrimination in the United States of America, it remains reasonable that South Africa extends the application of this right to cases of civil nature, including labour law criminal misconduct matters.

5 3 The development of the right against self-incrimination in New Zealand

In New Zealand, the right against self-incrimination has a status of a common law right. The case of *Murphy v Waterfront Commission*¹²⁰¹ made

¹¹⁹⁹ See, for example, principles in *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lachance v. Erickson*, 118 S.Ct. 753, 139 L.Ed.2d 695; *Bryson v. United States*, 396 U.S. 64; *U.S. v. Wong*, 431 U.S. 174; *U.S. v. Dunnigan*, 507 U.S. 87; *Hale v. Henkel*, 201 U.S. 43 and *Baxter v. Palmigiano*, 425 U.S. 308.

¹²⁰⁰ See, for example, principles in *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lachance v. Erickson*, 118 S.Ct. 753, 139 L.Ed.2d 695; *Bryson v. United States*, 396 U.S. 64; *U.S. v. Wong*, 431 U.S. 174; *U.S. v. Dunnigan*, 507 U.S. 87; *Hale v. Henkel*, 201 U.S. 43 and *Baxter v. Palmigiano*, 425 U.S. 308.

¹²⁰¹ 378 US 52(SC) at 55.

it evident that the importance of the privilege against self-incrimination is, as stated, “a landmark in man’s struggle to make himself civilised.”¹²⁰² Armed with this privilege, a suspect was protected from an array of possible prejudices, for example, cruel dilemma of self-accusation; perjury or contempt; exposure to intrusive accusatorial system manipulations; inhumane treatment and human rights violations; unfair inequalities and unbalanced exercise of power; and unfair intrusions of privacy and exposures to illegal persecutions.¹²⁰³ It is because of these qualities that privilege against self-incrimination withstood the test of reforms.

In the same vein, the New Zealand Law Reform Commission made several observations regarding this privilege to leave it as it applied under common law.¹²⁰⁴ In common law, privilege against self-incrimination prevented a litigant’s exposure to criminal prosecution, civil penalty and civil forfeitures.¹²⁰⁵ This background excluded employment investigations in private sector from requiring employees to disclose information in the course of proceedings.¹²⁰⁶ It was found that it would be dangerous to expose employees to self-incrimination because the prosecution has a potential to rely evidentially on the findings contained in an employer’s investigation without obtaining evidence through prescribed fair measures.¹²⁰⁷ Additionally, the prosecution could successfully reject the argument that answers to questions obtained in an employer’s investigation are inadmissible because they were involuntarily secured.¹²⁰⁸

They would base their argument to reject the opposition, on the very fact that an employee was under no obligation to make statements contrary to

¹²⁰² 378 US 52(SC) at 55.

¹²⁰³ *Murphy v Waterfront Commission* 378 US 52(SC) at 55.

¹²⁰⁴ Law Commission The Privilege against self-Incrimination (NZLC PP 25,1996) AT 29-30.

¹²⁰⁵ *Blunt v Park Lane Hotel Ltd* 1942 2 KB 253 at 257; 1942 All ER 187 at 189.

¹²⁰⁶ Goddard J 2011 *Canterbury Law Review* 251-282, at 258. Also see Couch T “The Right to Silence” in Employment Law Conference Nov 2002 New Zealand Law Society Wellington 2002 91 at 97.

¹²⁰⁷ *R v Dawson* 2004 2 NZELR 126 CA.

¹²⁰⁸ *R v Dawson* 2004 2 NZELR 126 CA.

their interest while ignoring the fact that employees are non-professionals as far as legal understanding is concerned.¹²⁰⁹

The adoption of the New Zealand Bill of Rights Act of 1990 (NZBORA) and the subsequent affirmation of the New Zealand's commitment to the International Covenant on Civil and Political Rights guaranteed privilege against self-incrimination as a human right.¹²¹⁰

5 3 1 The effects of the Employment Relations Act of 2000 (The ERA) on Common Law Right Against Self-incrimination

The guaranteed privilege against self-incrimination as a human right transpired into direct amendments to the employment relations. Through the enactment of the ERA New Zealand introduced privilege against self-incrimination into dismissal proceedings.

Among its provisions, the ERA requires that employees and employers be responsive and communicative in establishing and maintaining constructive relationships.¹²¹¹ It thus prescribes the duty of good-faith principle.

In New Zealand, the duty of good-faith principle is understood to be a broader expression of employee and employer trust relationship. It thus embeds the duty of good-faith in a wider scope than the common law implied duty of trust and confidence.¹²¹² Although they both relate to the same objective, New Zealand statutory good-faith principle ensures that there is no possibility that the parties may contractually expel it as they can do with implied obligation of mutual trust and confidence.

As mentioned earlier,¹²¹³ the implied obligation of mutual trust and confidence is formulated as a result on matters of fact and not on matters

¹²⁰⁹ *R v Lane* 2005 2 NZERLR 172 CA.

¹²¹⁰ Goddard J 2011 *Canterbury Law Review* 251-282, at 255.

¹²¹¹ Section 4(1A) (b).

¹²¹² See Goddard J 2011 *Canterbury Law Review* 251-282, at 261.

¹²¹³ In chapter two para 2 2 4 2 on the theory of flexibility and its extent in criminal misconducts discipline.

of law.¹²¹⁴ The same principle was later accepted in law as an implied term in every employer and employee contract.¹²¹⁵ It seems its volatile nature led New Zealand to the enactment of its progeny-duty of good-faith principle. The enactment of duty of good-faith principle has influenced the common law privilege against self-incrimination. It posed a question as to whether it has abrogated this right to the extent that employees cannot refuse to divulge self-incriminating information before disciplinary hearings or during employer investigations for dismissals based on criminal misconducts.¹²¹⁶

In light of section 60 (3) of the Evidence Act of 2006, there is no blanket answer to this question. According to this section, privilege against self-incrimination may be abrogated by necessary implication. It provides no explicit implication for the abrogation of privilege against self-incrimination.¹²¹⁷ This poses a nebulous approach prone to many interpretations.¹²¹⁸ Among the possibility, is that it could be argued that on the basis of duty of good-faith the employer may be tasked to not force the employee to provide incriminating information and the likelihood of which may end up in police custody.

The provisions of the ERA therefore do not remove the common law protection against self-incrimination. The employee criminal suspect still has the protection to refuse answering any incriminating question. In *Sharpe v Chief of the New Zealand Defence Force*,¹²¹⁹ the court held against the submission that an employee cannot refuse to participate in an employment

¹²¹⁴ See cases of *Woods v W.M Car Services (Peterborough) Ltd* [1981] ICR 666 and *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. As well, read Reynolds F 2015 ILJ 262.

¹²¹⁵ See cases of *Woods v W.M Car Services (Peterborough) Ltd* [1981] ICR 666 and *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. As well, read Reynolds F 2015 ILJ 262.

¹²¹⁶ Goddard J 2011 *Canterbury Law Review* 251-282.

¹²¹⁷ Regarding the need for explicit provisions for abrogation of human rights in *The New Zealand read R v Pora* 2001 2 NZLR 37 CA at 50. In this case, Justices Tipping and Elias held against implied abrogations. They held that "it was improbable that where human rights are affected Parliament would by a side wind do what it has not done explicitly."

¹²¹⁸ See *Regal Castings v Light body* 2008 NZSC 87; 2009 2 NZLR 433 per Tipping J and McGrath J and read *Taylor v New Zealand Poultry Board* 1984 1 NZLR 394 CA per McMullin J.

¹²¹⁹ Auckland AA 101/10, 4 March 2010.

investigation due to the duty of good faith. It was clarified that Parliament could not have intended that the duty of good-faith overrides section 23(4) of New Zealand Bill of Rights (NZBORA) or the common law right to silence.¹²²⁰

5 3 1 2 The South African fair dismissal perspective for employees' criminal suspects compared to the New Zealand perspective

South Africa like New Zealand has common law privilege against self-incrimination. It also elevated this privilege to a constitutional right and entrenched it in the Bill of Rights.¹²²¹ In the same note South African labour law observes the employee and employer trust relationship. In fact, the basis of the contract of employment is interpreted to be one of trust. If the employee becomes dishonest, that activates the employer's concern and therefore investigatory processes leading to dismissal.¹²²² South African jurisprudence expresses that the breach of trust principle is at the higher pedestal than the right against self-incrimination. In effect, the employer bears no duty to observe involved employee's rights as mandated in New Zealand.

The employer in South African labour law is legally clothed with wide discretion including the choice not to observe both of natural justice principles. The employer simply needs to give the employee an opportunity to answer to the allegations and would not be deterred by employee raising a concern regarding employee's right against self-incrimination. Since the employer only needs to afford the employee an opportunity to be heard, nothing else is required from the employer, if the employee insists on the

¹²²⁰ *Sharpe v Chief of the New Zealand Defence Force ERA Auckland AA 101/10*, 4 March 2010.

¹²²¹ Inferred in section 35(1)(a); (b); (c) and section 35(3)(h); (j) of the South African Constitution. In effect, the right against self-incrimination is maintained by observing all other rights referred to in these subsections.

¹²²² Refer to chapter two para 2 2 1 1, on the definition of criminal misconducts in labour law. As well see chapter three para 3 2, on the theoretical implications of LRA disciplinary processes for criminal misconduct.

right against self-incrimination and does not answer to the allegations, the employer can proceed with the process of disciplinary hearing and the employee stands to lose.

It is submitted that this total ignorance of individual interests in labour matters involving criminal misconducts is in effect an antithesis of what the South African Constitution stands for.¹²²³ The Constitution has introduced a human rights-based perspective of law. To the effect that the Parliament cannot enact legislation that is contrary to this constitutional objective. Like New Zealand, it is argued in this thesis, that South Africa has to relook at its interpretation of fairness in labour matters based on matters of criminal misconducts.

5 4 The development of the right against self-incrimination in the United Kingdom

In the United Kingdom, the origins of the right against self-incrimination are associated with several schools of thought.¹²²⁴ Although different in perspective as to what initially triggered the formulation of this principle, they have a common understanding regarding its rationale. They maintain it surfaced from deep historical contours—against oath *ex officio* that supported purely inquisitorial criminal processes but for accusatorial criminal processes that supported the principle, “*nemo tenetur seipsum prodere*, or no one is obliged to accuse himself.”¹²²⁵ The rationale for this principle is the same as the second leg of the natural justice principles of fairness explained in the previous chapter—the *Nemo iudex in propria sua causa* rule. It was established earlier that the application of *Nemo iudex in*

¹²²³ Mureinik E 1994 *SAJHR* 31, 32; Klare K 1998 *SAJHR* 146; Burns Y 2002 *SAPL* 283; *Shabalala v Attorney-General, Transvaal* 1995 12 BCLR 1593 (CC).

¹²²⁴ Some of these are the traditional view and the perspective on the *ius commune*. Read Helmholz R H 1990 *Ius Commune* 964; Moglen E 1994 92 *Mich. L. Rev* 1086, 1087, as well as, Langbein J H 1993-1994 *Mich L Rev* 1047, 1047 together with Helmholz R H 1990 *NYU L Rev* 962 964.

¹²²⁵ See Trainor A S 1994 *FILJ* 2139-2186 at 2144.

propria sua causa in labour law criminal investigations is jurisprudentially shunned in South Africa.¹²²⁶

Like the current South African employer criminal investigations' purely inquisitorial procedure supported the investigation of a suspect in secret and required that suspects swear under oath. In addition, the judges in inquisitorial systems had wide discretions; their powers were unlimited because they acted as accusers, prosecutors and presiding officers.¹²²⁷ A similar circumstance is apparent in employer criminal investigations and hearings for dismissals for employees who committed criminal misconducts. Within the United Kingdom common law, the basic form of the privilege against self-incrimination gives individuals freedom from compulsory self-accusation.¹²²⁸

5 4 1 Privilege against self –incrimination as a human right in the United Kingdom and its application in employment matters

At the hype of the adoption of a human rights-based approach to law in the European Union, the United Kingdom (UK) did not lag. Among other provisions that influence the continued observation of the right against self-incrimination in the UK, was Article 6 of the European Convention on Human Rights (ECHR). Article 6 reads as follows.

*In the determination of his **civil rights** and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private*

¹²²⁶ See cases cited in chapter one para 1 2 Statement of the Problem. *Avril* above note 6 at 838 and at 1652; *Mohammed v Chicken Licken* 2010 31 ILJ 1741 (CCMA) para 5.3.1; *Smit v Nashua East London* 201031 ILJ 1751 (CCMA) at para [13].

¹²²⁷ Read Charles H Randall Jr 8 SC LQ 417 420 421 1956.

¹²²⁸ See Trainor A S 1994 FILJ 2139-2186 at 2143-2144.

life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.¹²²⁹

The essence of Article 6 serves amongst others to protect individuals' rights against self-accusation including the right against self-incrimination. In consonance to this understanding, MacCulloch ¹²³⁰ writes:

the Article does not directly address the privilege against self-incrimination but guarantees that in the determination of any criminal charge against him, everyone is entitled to a fair hearing by an independent and impartial tribunal. The privilege is seen as being an integral part of that right.¹²³¹

¹²²⁹ Article 6 of the European Convention on Human Rights (ECHR).

¹²³⁰ MacCulloch A 2006 *Legal Studies* 211-257 at page 228.

¹²³¹ MacCulloch A 2006 *Legal Studies* 211-257 at page 228.

MacCulloch's exposure triggers a further explanation as to whom indeed Article 6 applies to. Does it indeed only refer to criminal charges as understood in the South African CPA? To answer this question the Jurisprudential opinions of the European Court of Human Rights are of assistance.

Subject to the European Court of Human Rights jurisprudence, the meaning of "criminal charge" is more than the eye perceives. This privilege applies to subjects of criminal persecution hence the decision in *Serves v France*¹²³² that,

*...[the] concept [criminal charge] is autonomous [and] has to be understood within the meaning of the Convention and not solely within its meaning in domestic law. It may thus be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence," a definition that also corresponds to the test whether "the situation of the suspect has been substantially affected..."*¹²³³

It is argued from the perspective adopted in this thesis that criminal misconduct allegations fall within criminal charges in the context of *Serves v France*¹²³⁴ holding. Very close to this reasoning is the United Kingdom Supreme Court unanimous ruling in *R (on the application of G) (Respondent) v The Governors of X School (Appellant)*.¹²³⁵ In order to decide the matter, the Supreme Appeal Court had to consider the applicability of Article 6 in employment dismissals. Consequently, it held that, "Article 6 of the European Convention on Human Rights, the right to a fair trial, is engaged in internal disciplinary proceedings if they will have a

¹²³² 1999 28 EHRR 265.

¹²³³ 1999 28 EHRR 265.

¹²³⁴ 1999 28 EHRR 265.

¹²³⁵ 2011 UKSC 30.

“substantial influence” on future proceedings, which are likely to determine a civil right.”¹²³⁶

According to the European Court of Human Rights,¹²³⁷ determination of a person’s civil rights means “proceedings the result of which is decisive for private rights and obligations.”¹²³⁸ These are proceedings which are “directly decisive” of the right in question to which Article 6 applies and not those which have a “tenuous” or “remote” consequence.¹²³⁹ Such proceedings include circumstances in which initial proceedings do not in themselves determine a civil right¹²⁴⁰ but are closely linked to subsequent proceedings, which do. Alive to this thesis is a circumstance created in the employer criminal investigations and subsequent disciplinary hearings to dismiss employees suspected of criminal misconducts. The employer processes will substantially affect the subsequent prosecution of the employee based on the same facts and evidence before the employer processes. To determine the link between the current and subsequent processes, the following factors are considered;

*...[W]hether the first proceedings are in fact dispositive of the later proceedings; how close the link is between the two proceedings; whether the object of the two proceedings is the same; and whether there are policy reasons for holding that article 6(1) should not apply in the first proceedings.*¹²⁴¹

¹²³⁶ *R (on the application of G) (Respondent) v The Governors of X School (Appellant)* 2011 UKSC 30.

¹²³⁷ (“ECtHR”) in *Ringeisen v Austria* (No 1) (1971) 1 EHRR 455.

¹²³⁸ (“ECtHR”) in *Ringeisen v Austria* (No 1) (1971) 1 EHRR 455.

¹²³⁹ *In Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, the ECtHR [36]-[59].

¹²⁴⁰ A civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. See Wex Legal Dictionary [Http://www.law.cornell.edu/wex/civil_rights](http://www.law.cornell.edu/wex/civil_rights). [accessed 28/06/2018].

¹²⁴¹ *In Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, the ECtHR [64]-[69].

In light of this reasoning, it ought to be tested whether the current proceedings could substantially influence any future proceedings. Implementing this concern to employer disciplinary processes, it would be inquired as to whether the employer criminal investigations and consequent disciplinary hearing processes for employees suspected of criminal misconducts, could have a substantial influence on the subsequent criminal proceedings. The answer to this would be in the affirmative. To give an example, as seen in cases cited in chapter four,¹²⁴² the criminal proceedings in one way or the other are based on the same evidence as the evidence collected through informal means by the employer. In most cases, the employer condemnation affects the employee's right to being presumed innocent until proven guilty.¹²⁴³

5 5 The South African fair dismissal perspective compared to the United Kingdom perspective

The South African procedural law is in fact the English common law procedure in most respects. In effect, South Africa and England have the same common law.¹²⁴⁴ The common law privilege against self-incrimination has the same rationales for both South Africa and England. In contrast to the United Kingdom, the South African application of privilege against self-incrimination, however, seems to be restricted to criminal matters following criminal procedure processes. Regardless of the Constitutional Court decision that the right against self-incrimination does not discriminate between civil and criminal matters,¹²⁴⁵ matters of criminal law nature

¹²⁴² Chapter four at par 4 3 1 on the parallel nature of criminal misconducts dismissal processes.

¹²⁴³ See *S v Mateke and Mabaso* CASE NO: A 120/2015 and the Case of *Minister of Police v RM M & Safety and Security Sectoral Bargaining Council* Case no: JR56/14.

¹²⁴⁴ Schreiner M C *The Contribution of English Law* 27. Monyakane above note 9 at 32 reiterates that, the common law of South Africa is a "mixture of English and Roman Dutch law."

¹²⁴⁵ At the inception of the South African Constitution in *Ferreira v Levin N O & Others* 1996 (1) SA 984 (CC) at paragraph 96. In the case of *S v Krcir and Others* 2016 2 SACR 214 Per Lamont J in his trial within trial decision and referring to *Black v Joffe* 2007 3 SA

seeking remedies through civil procedural processes seem to be excluded from the application of this privilege. Evident to this perspective is employer criminal investigations processes and employer disciplinary hearings on employees who have committed criminal misconducts discussed in chapters three and four.¹²⁴⁶

5 6 Conclusion

In the midst of slight developments and therefore limited research sources, this chapter has come up with possible approaches adopted in the three of common law jurisdictions when dealing with criminal misconduct dismissals.¹²⁴⁷ It has shown that in these jurisdictions, negation of the principle against self-incrimination is opposed and employer investigations and disciplinary hearings are urged to respect the fairness principles engaged in matters of criminal law nature. These jurisdictions operate in a perspective that is different from the current South African labour law perspective discussed in the previous chapters and yet they have a similar common law which embraced principles of natural justice including the right against self-incrimination and recently developed the application of these principles to employment law. Considering the legal developments made on the European and other common law countries which share common law with South Africa, there is hope that it will not be difficult to develop the law in the same manner in South Africa and for such a transformative position to gain traction. The anticipated developments seem immutable because South Africa shares similar common law principles, therefore the basics upon which to develop are already in place as a bedrock of justiciability. In this adventure, South Africa will not be beginning on a clean slate but will

171 (CPD), Obiter confirmed that amongst other rights, the application of the right against self-incrimination does not discriminate between criminal and civil matters. He held that, "The privilege which the witness has is not limited to criminal or civil trial proceedings."

¹²⁴⁶ See jurisprudence on fairness in employer criminal investigations and hearings for employees' criminal suspects' dismissals. Refer to chapter three and chapter four.

¹²⁴⁷ The United Kingdom; New Zealand and United States of America.

observe and confirm the advantages and solutions brought by the extensions on the application of the right against self-incrimination in civil law.

Observation of the right against self-incrimination in employer criminal investigations and dismissal hearings as an embodiment of the principle against self-condemnation will enable the recognition of many other constitutional rights entrenched in section 35 of the Constitution.¹²⁴⁸ It is hoped that this development will help influence the regime of fairness in employer disciplinary processes for dismissal of employees suspected of criminal misconducts. It will also improve the processes engaged as well as the standard of proof from a simple balance of probabilities standard.¹²⁴⁹

Using chapters one, two, three and four as the basis, the following chapter is a conclusion and observes possible avenues to correcting the anomalies brought by the ignorance of proportionality when dealing with investigations and disciplinary hearings of employees who are suspected of criminal misconducts.

¹²⁴⁸ In *Ferreira v Levin N O & Others* 1996 1 SA 984 (CC) at para 79, it was held that for the principle against self-incrimination to hold the standard of proof observed is of importance. The balance of probabilities was not preferred but the proof beyond a reasonable doubt. The centre to this is observation of principles supporting proportionality in matters of criminal law nature.

¹²⁴⁹ Consider *S v. Zuma and Others* 1995 2 SA 642 (CC); 1995 4 BCLR 401 (CC) at para 10. Per Kentridge AJ where he acknowledges that proof beyond a reasonable doubt is the standard of proof applicable in maintaining the right against self-incrimination and other connected rights.

Chapter Six

Conclusion and Recommendations

6 1 Conclusion

In line with the research questions and aims, the thesis has managed to expound on the right to fair labour practices, regarding the discipline of employees who have committed criminal misconducts. It has shown that it is through section 23 of the Constitution and the enactment of the LRA, that the application of the right to fair labour practices entailing the right to fair dismissal were entrenched. In line with the main research question and the main objective, this thesis illustrated how the right to fair dismissal was practicalised in employer criminal investigations and hearings for dismissals of employees suspected of criminal misconducts.

Through reference to Industrial Court jurisprudence, the thesis expounded on how common law founded the right to fair labour practices. It went further to show how the Industrial Courts' expression of *just cause* became adopted through the entrenchment of the right to fair labour practice in sections 23 and 33 of the Bill of rights. In addition, the thesis has shown how the enactment and subsequent implementation of the LRA Act regarding dismissals based on criminal misconducts negatively affected the fair dismissal of employee criminal suspects which was prior to that practiced by the Industrial Court.

The Industrial Court based its decisions on both principles of natural justice. The extent to which the LRA as an outflow to the South African transformative constitutionalism succeeded in facilitating the transformation of fair labour practices in South Africa was explicated. It was discovered that within the right to fair labour practices, the right to fair dismissal of employees suspected of criminal misconducts was misinterpreted. Also observed in this thesis, is that current interpretations of fair dismissal need

improvements to accommodate section 35 of the Constitution provisions of fairness in the investigation and dismissal of employee criminal suspects.

The thesis established that there is interrelationship between section 23(1) of fair labour practice rights and the Bill of Rights in South African Constitution, especially the rights in sections 33 and 35 of the Constitution encompassing the rights of employees suspected with criminal misconducts. The thesis located the right to fair labour practices within constitutional transformative objectives in the Preamble, section 1, 8, 9, 33, 35, 39 and 195.

The thesis assessed that the constitutional principle of justification for employer investigation procedures and hearings processes for dismissal of employees suspected of criminal misconducts bears its foundations in the principles of natural justice. It was found that common law courts including the Industrial Courts battled to develop jurisprudence that observed both natural justice principles of fairness.

This thesis observed further that this struggle amongst others, influenced the entrenchment of the wide constitutional principle of fairness. Such influence is also extended to the historical foundations of section 23 (1) of the South African Constitution.

The application of section 23(1) rights was found to be ignoring common law natural justice principles of fairness ensconced in section 35 of the Constitution read with that of just cause ensconced in section 33 of the Constitution and operationalised through the PAJA. The ensued jurisprudence negatively affects the interpretation of what constitutional fairness in cases of dismissals based on employees' criminal misconducts ought to be. The thesis found out that theoretical underpinnings of employer criminal investigative powers and adjudicative powers for disciplining employee criminal suspects was mainly to satisfy the employer rights to flexibility, which was identified as a progeny of the common law principle of implied breach of trust between the employer and the employee as opposed to employee criminal suspects rights entrenched in section 35 of the

Constitution and principles of fairness entrenched in section 33. It was found out that the common law principle of implied breach of trust between the employer and the employee is a simulated principle which is not a legal principle as such.

It was also argued that section 35 of the Constitution expresses the constitutional mandate for the fair treatment of criminal suspects and therefore fairness with respect to employees who committed criminal misconducts. As a matter of law implied, breach of law cannot supersede the principle of fair treatment of criminal suspects ensconced in section 35 of the Constitution.

The thesis observed that there is an interlink between the investigation and disciplinary processes against the employee, who has committed a criminal act and the ultimate determination of criminal liability in the subsequent criminal trial proceedings. It then argued that the impact of ignoring the observance of section 35 rights, especially the rights against self-incrimination in employer criminal investigations and subsequent criminal disciplinary hearings, on the subsequent criminal trial is unconstitutional. It was argued that the unconstitutionality is even more evident in the light of an interlink that exists between fairness in section 23(1) and section 33 of the Constitution. It was found that the labour law jurisprudential interpretation of the LRA supports the view that section 145 of the LRA categorises legislation in consonance with the PAJA review standards umbrella. It was argued that the operationalisation of section 23(1) through the employer criminal investigation and subsequent criminal disciplinary hearing would observe section 33 fairness demands as mandated by the Constitution and could not ignore the expression of wide constitutional fairness entailing the observation of both natural justice principles.

The thesis argued that the principle of justiciability entrenched in section 33 of the Constitution ensures that power is exercised within constitutional justification. It was found out that fairness measures encapsulated in labour law jurisprudence on employee criminal misconducts does not currently

derive measures from sections 33 and 35 constitutional fairness principles intended for justification. For example, the ignorance of principles underlying section 35 in matters of criminal law nature also ignore constitutional justiciability principle.

The thesis found out that there are exigencies related to the ignorance of measures from section 35 constitutional fairness principles intended for a matter of criminal law nature when dealing with criminal misconducts. It argued that South African labour law jurisprudence on dismissal of employees suspected of criminal misconducts reflect these flaws. The thesis suggested possible resolutions to the identified possible flaws. It recommended that international jurisprudence on the dismissal of employees suspected of criminal misconducts be utilised in order that South Africa develops the law to remedy the identified fairness.

The explained attempts satisfied the thesis objective of investigating how employers' criminal investigation procedures and disciplinary hearing processes in cases where the investigated misconducts are criminal acts and are dealt within section 23(1) fairness.

The thesis therefore argued for constitutional redefinition of the involved procedures and processes with the aim of culminating a clear and well-defined constitutional equity measure of justice which emulates the previously envisaged Industrial Court equity perspective on labour disciplinary processes based on common law fairness principles of natural justice.

The international jurisprudence of the United States of America, New Zealand, and United Kingdom on the application of the employee criminal suspect's right against self-incrimination has been argued for as a hopeful idea for development of the current employer investigation processes and hearing procedures for dismissal of employees who have committed criminal misconducts.

The South African law of dismissal regarding criminal misconducts has been shown to be not adopting defined legal principles for matters of

criminal law nature. As such, the law has been proven volatile to procedural manipulations. It was shown that this state of law leans more on procedural prejudices than being mechanism towards expected constitutional labour practices explained in chapters one, two, three, four and five. In the middle of this problem is the State of South African law in general, namely that South Africa has a compartmentalised justice system as shown in cases discussed in chapter four.

It was argued in chapter four that the South African justice system is demarcated into civil and criminal justice systems. In some instances, as shown in chapter three, these demarcations prove disadvantageous. As shown in chapter three, in situations where matters of criminal law nature are decided in terms of civil prescripts constitutional objectives are sacrificed to the extent that such decisions could be expressing a constitutional taboo.

It was explained in chapters one, two, three and four and five that South African justice system pertaining to matters of criminal law nature vouches constitutional compliance because the Constitution is the epitome of all jurisdictive decisions. All jurisdictive decisions in matters of a criminal law nature ought to comply with the principle of proportionality emphasised in section 35 of the Constitution. As shown in chapter three, the measure of reasonableness in labour law fairness matters ought to be within the prescripts of section 33 of the Constitution read with the Constitutional transformative principles in the Preamble, sections 1,8,9,23,33,35 and section 195 of the Constitution. Obvious to the South African constitutional objectives is the implied sections 8 and 39 cumulative interpretation of constitutional clauses as opposed to piecemeal expression of constitutional clauses illustrated in chapter three jurisprudential expression of section 23(1) of the Constitution.

In chapter three, it was argued that clause 23(1) cannot be interpreted without observing sections 1,8,9,33,35,39 and 195 of the Constitution. It was argued in chapter five that the solution for the current problematic

jurisprudential interpretation of section 23(1) objectives could be found in a system that has shifted away from a mode of justice strictly compartmentalising civil and criminal processes.¹²⁵⁰ Through illustrations derived from recent case law dealing with criminal misconduct dismissals, chapter four has exposed the dilemmas ensued in the South African narrow approach.

An example of a reformed model used in the United States of America; New Zealand and United Kingdom was shown in chapter five. This model opposes a strictly *compartmentalised* system and vouches an all-inclusive system. It differentiates employer investigations and exercises more caution where the formal bodies for investigations are not tasked with the investigations, but instead different authorities and employers are engaged. These include investigations where the incident under investigation may be criminal in nature as well as those where the incident is a purely civil matter. Even greater caution is taken when dealing with potentially criminal matters. It was seen in chapter five that for purposes of finding justice for employees suspected of criminal misconducts, the section 35 constitutional rights afforded to criminal suspects are ought to be taken seriously. The American precedent, for example, has been exposed to firstly place at the centre, the application of the Fifth Amendment to the United States Constitution. The Fifth Amendment put emphasis on the application of natural justice principles discussed in chapter one and chapter two.¹²⁵¹ Secondly, as shown in chapter five, the application of these principles in the United States of America; New Zealand and United Kingdom does not discriminate between criminal and civil proceedings. If the dismissal proceedings are in fact dispositive of the later criminal proceedings, the employee suspected

¹²⁵⁰ The discussed jurisprudence in The United States of America; The United Kingdom; and The New Zealand which are commonwealth states bearing similar basics on labour law principles with South Africa.

¹²⁵¹ *Murphy v Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). Followed in *M alloy v. Hogan*, 378 U.S. 1 (1964); *Spevack v. Klein*, 385 U.S. 511 (1967) and *Garrity v. New Jersey*, 385 U.S. 493 (1967). Also see *Andresen v. Maryland* 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976).

of a criminal misconduct apprehends self-incrimination as soon as the employee is called to answer to the employer charges.¹²⁵²

Thirdly, the assertion of this principle does not depend on the form of the proceedings but the nature of the subject matter of the proceedings because the right against self-incrimination is invoked in civil, criminal, administrative or judicial, investigatory or adjudicatory proceedings dealing with matters of criminal law nature.

Fourthly, the nature of protection is not discriminatory on the process followed because its application depends on the question posed.¹²⁵³ As argued earlier, the relevance of the United States of America; New Zealand and United Kingdom jurisprudence on dismissal of employees suspected of criminal misconducts cannot be denied. It is persuasive in South African law bearing section 39 of the Constitution provisions. Marked by their similar human rights constitutional concerns, the South African, United States of America; New Zealand and United Kingdom fundamentals on the rights to remain silent and the right against self-incrimination evolved from the same perspectives.¹²⁵⁴

Even Theophilopoulos¹²⁵⁵ recognizes the evolutionary similarities of the South African constitutional rights against self-incrimination in section 35 of the Constitution with the United States of America; New Zealand and United Kingdom as common law-based states. He identifies the historical origins of the right of protection against self-incrimination as emanating from the utilitarian English common-law rule and having cascaded into the United States hence and reflected in The Fifth Amendment of the constitution of the United States in a similar language as that in section 35. He therefore

¹²⁵² *McCarthy v Arndstein* 266 U.S. 34 (1924).

¹²⁵³ *Butterfield v State*, 992 S.W.2d 448 (Tex. Crim.App.1999).

¹²⁵⁴ Theophilopoulos above note 869 at 516–517.

¹²⁵⁵ Theophilopoulos above note 869 at 516–517. As well read Theophilopoulos C 2003 *SLR* 161. Read with Theophilopoulos C 2003 *SLR* 161 and South African Law Commission In *Simplification of Criminal Procedure — A More Inquisitorial Approach* South African Law Commission Discussion Paper 89 Project 73 (April 2001) suggesting an amendmend of the right to silence along the lines set out by the English Criminal Justice and Public Order Act 1994. As well See Theophilopoulos C 2002 *SACJ* 321.

acknowledges that this right, regardless of its inclusion in the South African constitution, is susceptible to the influence of United Kingdom statutory developments.

The thesis suggests that it would therefore not be so far-fetched to borrow the *nitty-gritty* of the right-to-silence application in employer dismissals from the international jurisprudence for purposes of developing a working employer–employee investigatory and disciplinary processes for dismissal in South Africa.

It suggests further that even though the difference in the application of the natural justice principles relating to the right-to-silence between South Africa and these jurisdictions can be ignored as such, bears no major negative impacts.¹²⁵⁶ American perspective illustrates these differences.

6 1 1 The United States of America's perspective of the right to remain silent compared to the South African perspective

As shown in chapter two, according to the South African approach, the right to silence has two distinct rights, namely the right to silence which applies in pre-trial stages¹²⁵⁷ and the right against self-incrimination which applies as privilege during the criminal trial.¹²⁵⁸ American jurisprudence combines the right to silence and the right against self-incrimination in one silence principle. It applies this principle in both State and public office related investigations as well as private law investigations as explained above.¹²⁵⁹

The American idea cannot be much divorced from the South African understanding about the protection of individual rights from counterpart parties wielding extensive powers. If the exercise of powers within the South

¹²⁵⁶ See Theophilopoulos C 2003 *SLR* 2 at 161, who explains that this becomes obvious not so much from a theoretical perspective, but when these rights are invoked in practice.

¹²⁵⁷ See Theophilopoulos above note 1296.

¹²⁵⁸ See Theophilopoulos above note 1296.

¹²⁵⁹ See, for example, principles in *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lachance v. Erickson*, 118 S.Ct. 753, 139 L.Ed.2d 695; *Bryson v. United States*, 396 U.S. 64; *U.S. v. Wong*, 431 U.S. 174; *U.S. v. Dunnigan*, 507 U.S. 87; *Hale v. Henkel*, 201 U.S. 43 and *Baxter v. Palmigiano*, 425 U.S. 308.

African law could be explored, it will be seen that there is a possibility for a new perspective in labour law investigations where employers are waging massive powers against employees as seen in chapter three.

In this respect, the Constitution can rightly be considered a major instrument for transformation in labour decision making. The exercise of every power whether private or public power in South African law is ought to be highly scrutinised and measured within constitutional prescripts of reasonableness, fairness, justification and lawfulness which are the centre principles explaining the rationale for natural justice.¹²⁶⁰

The operation of every power including employer powers exercised in terms of the South African law must be constitutionally monitored. This is with the aim of maintaining constitutional values of human dignity and equality. The constitutional monitoring of lawful powers aligns with the constitutionally elected wide interpretation of the Constitution¹²⁶¹ as opposed to the common law narrow interpretation of statutory powers¹²⁶² which could not cater for the growing sophistication of governance in the current times. The constitutional era vouches the importance of a more progressive interpretation of discretionary powers. At the centre, the Constitution protects the rule of law by ensuring that the Constitution should be supreme to the interpretation of discretionary powers so that individuals are protected from arbitrary decisions.

Through the right to administrative justice as a human right, for example, individuals are constitutionally protected from the exercise of arbitrary powers.¹²⁶³ To realise administrative justice within which the employer discretion falls, the Constitution demands that it should be essential to

¹²⁶⁰ Read sections 33 and 23 of the Constitution and section 145 of the LRA which in effect subject employer powers and discretions within constitutional values of fairness, reasonableness and justifiability.

¹²⁶¹ Within sections 1,8,9,23,33,35 and 195 of the Constitution.

¹²⁶² In accordance with positivists approach of law, that regarded law as what is covered within the four corners of the statute. No rationality whatsoever of the law was referred to.

¹²⁶³ See section 24 of the Interim Constitution and subsequently section 33 of the Constitution.

confine administrative bodies exercising delegated powers to the observance of principles of natural justice, fairness, reasonableness and lawfulness so as to limit opportunities for the abuse of power.¹²⁶⁴ In addition, the due process of law must be maintained through reasonable opportunity to challenge administrative action.¹²⁶⁵

The section 33 right to administrative justice demands lawful, fair and reasonable treatment of individuals by the administrative bodies. This offers flexible procedures for individuals to test administrative decisions before courts of law in terms of these principles. In order to give effect to the right to administrative justice as a human right, the PAJA¹²⁶⁶ was enacted. In redefining administrative justice to transform discretionary powers from a prejudicial form of justice similar to the pre democratic system of discretion¹²⁶⁷ under the parliamentary sovereignty – to one based on a culture of human rights within the constitutional demands.

The objective of the Constitution in embracing sections that deal with the rules of administrative law (including the traditional principles of natural justice) was to remedy the anomalies of the pre-democratic era that

¹²⁶⁴ Section 33 of the Constitution.

¹²⁶⁵ Gellhorn *Administrative Law and Process in a Nutshell* 22.

¹²⁶⁶ Act 3 of 2000 [the PAJA]. This is in accordance with section 33(3) of the Constitution, which requires that national legislation be enacted to give effect to the right to administrative justice as a human right by providing for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; by imposing a duty on the state to give effect to the rights in subsection (1) and (2); and by promoting an efficient administration.

¹²⁶⁷ According to Schreiner M C *The Contribution of English Law* 87,

apartheid means separation or segregation-the keeping apart of the several races of South Africa. Sometimes the euphemism "separate development" is used instead, but the meaning is the same. Apartheid has a history going back to the earliest days of white settlement in South Africa. It has become more and more important in the life of the country during recent decades as all races have rapidly become more and more urban and industrialized, and as what used to be a natural and elastic practice for like to seek like has become a compulsory, hard and fast system laid down for all by the majority of politically dominant white minority.

prevailed in exercising potentially prejudicial powers like the LRA employer criminal investigatory powers.¹²⁶⁸

In urging justiciable discretion in exercising power and an awareness of proper administrative procedures, the Constitution aims at reducing the rigidity of administrative law by providing a proactive measure to monitor administrative power in all respects as soon as it is used.¹²⁶⁹

The Constitution further empowers individuals to participate in the enforcement of their rights without fear. Furthermore, the Constitution improves the position of the common law review of administrative decisions. Instead of being an inherent power of the Supreme Court, judicial review is now embedded in the Constitution. These improvements ensure individual protection and therefore liberty in civil governance.¹²⁷⁰

The Constitution appreciates the massive power of the office bearers against the individual who has no power and mitigates the disadvantages ensued in the inequity. In the light of the South African right to administrative justice which insists that similar natural justice principles apply in justifying administrative action against an individual who bears no power, regardless of whether it emanates directly from the State or from private entities, it is reasonable to argue that the international jurisprudence's¹²⁷¹ explanation of the application of the right to silence as far as the exercise of employer power is concerned, can well be used to explain the scope of the application of rights against self-incrimination and silence on private powers upon which employer criminal investigations are based in South Africa.

¹²⁶⁸ Section 33 read with section 195 of the Constitution; Beukes above note 98 at 12.

¹²⁶⁹ Sections 33 and 195 of the Constitution read with the Preamble and section 1. The Preamble sets the objectives of the Constitution while section 1 relates the constitutional values. The Preamble and section 1 are basic provisions to the interpretation of transformation provisions such as section 33 and section 195. Also see Beukes above note 98 at 12.

¹²⁷⁰ Akokpari J *Governance and Politics in Africa* 5. Also see Chabal P in *Political Domination in Africa* 8.

¹²⁷¹ See, for example, principles in *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lachance v. Erickson*, 118 S.Ct. 753, 139 L.Ed.2d 695; *Bryson v. United States*, 396 U.S. 64; *U.S. v. Wong*, 431 U.S. 174; *U.S. v. Dunnigan*, 507 U.S. 87; *Hale v. Henkel*, 201 U.S. 43 and *Baxter v. Palmigiano*, 425 U.S. 308.

The above explanation exposes that even in the current times under the Constitution, the twin principles of natural justice are of essence. A close examination of the basic elements of the right to administrative justice entrenched in section 33 of the Constitution reveals that the practicalising of constitutional principles aims at promoting fairness. Fairness¹²⁷² has therefore become the basis of constitutional objectives namely, respecting, protecting, promoting and fulfilling individual rights and freedoms. The same objectives are inferred in constitutional provisions of section 23(1), read with the Preamble, section 1, section 8, section 9, section 33, section 35, section 39 and section 195 of the Constitution.

6 1 2 The application of section 23(1), read with sections 8 and 39 respecting employees suspected of criminal misconducts

It was discovered that the application of section 23(1) of the Constitution without the demands in sections 8 and 39 has led to devastating circumstances. First the secluded application of section 23(1) misinterprets constitutional objectives as far as employment law is concerned. As observed earlier, in terms of section 8 of the Constitution, private power relations must recognise and apply the rights in the Bill of Rights in day to day dealings. The observance of these rights need not discriminate between the legal classes of persons. It should apply to all relations, be it among natural or juristic persons or between both. Section 39 provisions also subject the courts; tribunals; the legislature and the executive to the same constitutional demand of observing entrenched human rights. When exercising disciplinary powers, the employer ought to act reasonably, fairly and justiciable. Secondly, that jurisprudence relating to dismissals based on criminal misconducts inclines to informal criminal procedure is against the employer's duty to observe sections 8 and 39(2) of the Constitution in the

¹²⁷² Baxter *Administrative Law* L B 482. Also see *MacLean v The Workers Union* 1929 (1) Ch. 602, 624.

execution of fair dismissals. Thus, employers are acting against constitutional demands.

Contrary to the above expectation, as explained earlier in chapter three, the current jurisprudence misinterprets constitutional demands. This interpretation is against the demand that the interpretation of legislation and development of the common law or customary law by courts, tribunals or forums must promote the spirit, purpose and objectives of the Bill of Rights.¹²⁷³ Such interpretation as observed earlier, is against constitutional objectives and values entrenched in the Preamble and section 1 of the Constitution.¹²⁷⁴ It is against the constitutional rationale of change of South African legal perspective from authoritarian to the realisation of constitutional transformative objectives which aim at a rights based decision making.¹²⁷⁵ It therefore negates the rationales for the foundational principles of natural justice, later entrenched in the Bill of Rights and in particular section 35 of the Constitution. As it was pointed out earlier, section 35 supports the nitty- gritty of fairness principles regarding criminal suspects.

To attain the necessary change in labour law fair dismissal, it is therefore important that employers exercise criminal investigatory powers and powers to hold disciplinary hearings of criminal suspects in accordance with the constitutional call. When employers investigate, and discipline employees suspected of criminal misconduct, they must observe the constitutional rights of criminal suspects.

The odds would be stacked against employee criminal suspects if the employers failed to observe their constitutional rights as criminal suspects. This assessment reveals that observing the constitutional expression in sections 8 and 39 during employer disciplinary proceedings would also call

¹²⁷³ See section 39 and also read *Pharmaceutical Manufacture Association of South Africa In Re: The Ex parte Application of the Republic of South Africa* 2000 2 SA 674 (CC) 49.

¹²⁷⁴ Chapter 1 of the Constitution entrenches the founding provisions that include supremacy of the Constitution.

¹²⁷⁵ Mureinik E 1994 *SAJHR* 31, 32; Klare K 1998 *SAJHR* 146, who extensively discuss the constitutional perspective in relation to the exercise of authority.

for the observance of section 35 of the Constitution. This in turn postulates that an employer with the power to investigate criminal misconducts and hold subsequent disciplinary hearings must observe the rights regarding criminal suspects entrenched in section 35 of the Constitution. As illustrated in chapter two, section 35 embodies wide constitutional principles of fairness entailing the twin principles of natural justice.¹²⁷⁶

6 2 Recommendations

There is a major need for a radical reinterpretation of the right to fair labour practices especially the right to fair dismissal of employees suspected of criminal misconducts. The first step towards eradicating the misinterpretation of the right to fair dismissal for employees suspected of criminal misconduct is to reform the law that incorporates and facilitates such dismissal. The second step is to address the unjustifiable procedures adopted in the current processes of investigations and hearings of criminal misconducts.

6 2 1 Enact legislation to control employer massive discretion

Thus far, the law pertaining to dismissals, is found in the legislation annexed code. Codes are normally just guidelines aimed at enforcing the provisions of the main Acts of Parliament. Codes can be compared to soft law that can be changed in accordance with standards willingly adopted by the implementer of the provisions of the code. Codes are an expression of what the implementer finds suitable in the circumstances within which the implementation of the law itself takes place.

The labour code, like other codes are just guides to the employer who must take steps and implement the constitutional right to fair labour practices including right to fair dismissal.

The employer therefore chooses how to exercise discretion to dismiss based on criminal misconducts. The employer's subjective decision is

¹²⁷⁶ At various paras in chapter two.

influenced by the circumstances of the case and the understanding of what the misconduct at hand means to the employment circumstances. The employer regards less than what another employer may take the misconduct to mean at its own institution.

It was explained earlier that the right to fair dismissal with respect to employees who committed criminal misconducts is explicitly provided for in Chapter VIII sections 185, 186, 188 of the LRA read with Schedule 8 of code of good practice: dismissal, items 2,3,4 and 7. It was also explained that the major law is section 23 of the Constitution founded on the common law equity perspectives of the Industrial Court.

The practical effect of these provisions is in the code of good practice given practical effect to employers. Employers are expected to administer compliance within the code of good labour practice but without statutory guidelines. Employers provide guidelines to employees regarding their relationship with the legislature.

It is however wrong that the labour code does not provide a detailed standard of conduct for employers. Such excessive types of discretion coupled with the fact that employer discretion is based on flexibility principles emanating from *simulated common law principle* of implied breach of trust between the employer and the employee which can be applied, however calls for stringent measures if employee criminal suspects' rights are to be taken seriously.

According to the Code, employers are responsible for the efficient management and administration of their institutions and the upkeep of discipline but within their discretionary powers. They may therefore, willi-nilly supplement the code of good practice to provide for their unique circumstances and institutional objectives, in the circumstance if they wish to exclude employee rights, they may do so without any limitation.

The purpose of the code is therefore the promotion of exemplary conduct in accordance with the employer's discretion. While employers are guided

through soft law, employees can be declared guilty of misconduct without legislative means and be accordingly punished.

This scenario as mentioned in previous chapters, escapes the bounds of constitutional reasonableness and justification expected from labour law fair dismissal for employee based on criminal misconducts ¹²⁷⁷ A proper legislation that addresses a justified discretion in terms of the constitutional principles of justification against flexibility oriented employer discretion in matters of a criminal law nature should be enacted. That law will take regard of principles incorporated in section 35 of the Constitution including the right against self-incrimination.

6 2 2 Invoke section 35 of the Constitution Rights in employee criminal misconduct matters

It is without doubt that in order to avoid inequalities in treating criminal suspects, the investigatory and disciplinary hearings for criminal misconducts must observe individual rights. Employees suspected of criminal misconducts like other vulnerable categories of individuals must be clothed with section 35 protection against the massive hands of the employer.

The investigatory and disciplinary hearings for criminal misconducts must observe individual rights. Employee criminal suspects must have the right to question the reasonableness, fairness and justiciability of powers exercised to their detriment before the courts of law. They must as well exercise their rights against self-incrimination. They must not be made to make criminal cases against themselves. They must be protected like other criminal suspects. They ought not to have to subject themselves to the arbitrary decisions of the employer. The extent of employer's discretion to investigate criminal misconduct and hold disciplinary hearings must be legally monitored.

¹²⁷⁷ Section 33 reasonableness that takes regard of both principles of natural justice.

In any action that affects the employee criminal suspects, a clearly defined law embedded within constitutional objectives should guide the investigations and hearings.

In order to attain equal treatment of employee criminal suspects with ordinary criminal suspects, both the employer and employee should observe the ethical values of fairness, reasonableness and lawfulness inferred in the CPA as well as in the PAJA.¹²⁷⁸ Labour law should be reformed and be read to consist of a group of vital principles, which provide for what should be done and what should not be done to attain justice in the employer criminal investigatory and disciplinary hearings for suspects of criminal misconducts.

The progressive discipline; and the wide employer discretion-oriented perspective, should be restricted. This approach as indicated in chapters two; three; four and five denotes a process that provides no control of employer power to ward off the possible dangers of abuse of power. It lacks respect for the protection of human rights under constitutionalism. This shows that, while the concept of fair dismissal has developed over time, its development and role have never been substantial even under constitutional dispensation.

The current interpretation of the right to fair dismissal does not promote mechanisms that could control employer powers in protection of individual rights. It does not limit excessive power that could be exercised to the detriment of individual rights. In this way, employer criminal investigatory processes and disciplinary processes cannot be equated to the restoration of the basic principles of humanity associated with natural justice like it can be inferred in criminal justice processes under the CPA and PAJA.¹²⁷⁹ The CPA and PAJA processes mark the protection of individual rights as the

¹²⁷⁸ These principles are basic to the principle of natural justice.

¹²⁷⁹ Locke J *Two Treatises on Civil Government* 10. Locke's theory of law, (i) stipulates that the purpose of natural law theory is to explain the foundations and maintenance of legal order. (ii) emphasises the inalienable right of the people to establish the legal order to suit the protection of their general rights.

central aspect of justice. This in turn implies that the failure of labour law in promoting natural justice based criminal justice affects not only the maintenance of law and order, but its basic existence.

With all these negative aspects regarding the current perspective of the right to fair dismissal, it is advisable to explore the approaches used in the United States of America, New Zealand and United Kingdom exposed in chapter five to reform the South African position.

This is the responsibility of the legal fraternity in general, including the courts. First, employees facing criminal charges before their internal employers who are also investigating crimes must be knowledgeable that there are other constitutional rights at stake. The employees must be aware of their constitutional rights so that they are aware of what rights are at stake.

Furthermore, investigators must be proactive and point out the gap concerning the lack of observation of involved rights when they are involved in employer investigations. The legislature must enact clear and precise laws to guide employers in their investigations and hearings. The law reform bodies must recommend the enactment of laws that are Constitution conscious. Where such laws were enacted before the coming into effect of the Constitution, the necessary amendments must be made as a matter of urgency. Disciplinary committees must always take the proper steps in the pursuit of constitutional justice objectives. They must pay regard to constitutional objectives while pursuing their own objectives to avoid unnecessary clashes between their internal investigations and constitutional rights. Commissions which deal with the litigation of cases based on criminal investigations, in which the due process of law was not followed, must be aware of this.

Justice by ambush must be discouraged at all costs, especially in the current era of the Constitution. All the stakeholders involved in the processes of employer criminal investigation and hearings for dismissal of employees suspected of criminal misconducts must be constitutionally

compliant. Exclusion of the second leg of natural justice principles that no one must be judged at his own cause, if not tailored within section 36 exclusionary clause, remains illegal and therefore unconstitutional.¹²⁸⁰

6 2 3 Highlight the importance of considering the second leg of natural justice principles

If the applicability of the second leg of natural justice principles is encouraged, South African labour law would become as progressive as its counterpart common law countries jurisprudence demonstrated in chapter five. In chapter five, it was observed that the United States of America; New Zealand and United Kingdom labour law position at the centre, the observance of human rights. As seen in chapter five, the United States of America as an example, considers the application of the Fifth Amendment to the United States Constitution. The Fifth Amendment emphasises on the application of natural justice principles discussed in the previous chapters.¹²⁸¹ It is this perspective that promotes observance of proportionality in dealing with matters of criminal law nature. It was observed in chapter two that proportionality underscores all aspects of criminal justice.

6 2 4 Remedy parallel criminal investigations

As shown in chapter five, the application of the second leg of natural justice principles in labour law eliminates discrimination between criminal and civil proceedings as long as the suspect or the witness apprehends self-incrimination.¹²⁸² By doing so the disunity between criminal and civil employment law that causes massive problems as seen in chapter four is

¹²⁸⁰ Exclusion of self- incrimination privilege *Harold Bernstein and Others v L. Von Wielligh Bester NO and Others* 1996 4 BCLR 449; 1996 (2) SA 751 para [3].

¹²⁸¹ See the American cases of *Murphy v Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). Followed in *Malloy v. Hogan*, 378 U.S. 1 (1964); *Spevack v. Klein*, 385 U.S. 511 (1967) and *Garrity v. New Jersey*, 385 U.S. 493 (1967). Also see *Andresen v. Maryland* 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976).

¹²⁸² *McCarthy v Arndstein* 266 U.S. 34 (1924).

eliminated.¹²⁸³ When an employee is not expected to make a case against itself, the principles underlying the rationale of criminal investigations will be followed. In doing this, the gathering of evidence will be made in accordance with the rationale of principle of proportionality explained in chapter two. As explained earlier, the principle of proportionality is fundamental to all aspects of criminalisation.

6 2 5 Make a mandatory Use of natural justice principles across board proceedings

The South African law in general must move away from a compartmentalised system to an all-inclusive system. In chapter five, it was shown that America has progressed by removing demarcations between civil and criminal law systems. America is, therefore, able to identify issues in dispute and align them to the law that provides justiciable remedies. American system distinguishes investigations and exercises more caution where the formal bodies for investigations are not tasked with the investigations. This is where a criminal matter is classified under civil law like in labour law matters. Instead of focussing on classification, they make the nature of issues the focus of dismissal disputes. Thus, enable the determination of the civil matter through the recognition of both natural justice fairness principles.

6 2 6 Eradicate discriminatory protection between employee criminal suspects and other criminal suspects

For the legal protections not to be discriminatory against criminal suspects, the application of protective natural justice principles must depend on the question posed and not on whether the matter belongs to the civil or criminal justice system.¹²⁸⁴ The major question in determining the existence of a

¹²⁸³ See chapter four para 4 3 and para 4 3 1 on the parallel nature of criminal misconducts dismissal processes.

¹²⁸⁴ *Butterfield v State*, 992 S.W.2d 448 (Tex. Crim.App.1999).

criminal misconduct is to establish whether a criminal act was perpetrated by the suspected employee. The criminal liability concern should immediately prompt the need to investigate the employee criminal suspect and thus the application of natural justice principles.¹²⁸⁵

6 2 7 Explore the possibility for a statutory direct exclusion of privilege against self-incrimination

Some South African courts decisions may suggest a possibility for a law that directly excludes privilege against self-incrimination.¹²⁸⁶ However, there is no law that directly excludes the right against self-incrimination.

It is possible to argue that in light of the current position of law, where there are no direct laws that exclude the application of natural justice principles used in criminal investigation, when the employer engages in criminal investigations, the perspective followed in the United States of America; New Zealand and United Kingdom employment law jurisprudence seen in chapter five is a better perspective. In the same way as it happens in these common law jurisdictions, South Africa must approach matters involving criminal misconduct from their nature of being matters of criminal law nature. The application of section 35 of the Constitution principles is ought to be mandatory in criminal misconduct matters.

We learned in the previous chapter that the American Supreme Court cases of *Garrity v New Jersey*,¹²⁸⁷ and *Gardner v. Broderick*,¹²⁸⁸ decided against the involuntary waiver of the constitutional right to silence by virtue of

¹²⁸⁵ Consider concerns raised in disregarding the potential for disproportionate punishment in Chong M D Fellows J and Richards F 2013 *Sydney Law Review* 379, 381-2. Read the rationales for considering the right against self-incrimination in employment law matters of criminal law nature in *Serves v France* 1999 28 EHRR 265; *Ringeisen v Austria* (No 1) (1971) 1 EHRR 455; *In Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, the ECtHR. Compare with Newaj K 2016 *THRHR* 429-442 at 433 on the impact of dishonesty constituting criminal misconduct. Read these together with chapter five of this thesis and chapter two at para 2 2 4 1 dealing with the theory of proportionality and its extent of application in criminal misconduct discipline.

¹²⁸⁶ *Harold Bernstein and Others v Von Wielligh Bester NO and Others* 1996 4 BCLR 449; 1996 2 SA 751 para [3].

¹²⁸⁷ 385 U.S. 493 (1967).

¹²⁸⁸ 392 U.S. 273 (1968).

employment. The court held that the objective of this constitutional right is the protection of individuals from coerced self-incriminating testimony. With particular reference to administrative criminal investigations, the court held that even though it is not compulsory to caution an employee of this right before testifying, the employee must be given immunity against the self-incriminating testimony in future criminal trials if the employee happens to give any during the internal investigation.

It was seen in chapter five that the United States of America, which shares similar foundational perspectives with South Africa, has advanced as far as the application of rights to remain silent and against self-incrimination are concerned. While South Africa is still lagging, the United States of America; New Zealand and United Kingdom have advanced in the sense that employers investigating employee criminal misconducts operate under a defined jurisprudence entailing the right to silence and against self-incrimination. As far as South Africa is concerned, the developments shown in the United States of America; New Zealand and United Kingdom jurisprudence calls South Africa to align with these developments.¹²⁸⁹

6 3 Questions for further research and the need for way forward research

The major concern relates to questions regarding the parallel nature of our legal system. There are current international transformational steps towards deciding cases by first looking at the nature of the cause of action as opposed to classification into criminal and civil. South Africa must follow suit and engage in research that breaks the criminal and civil systems dichotomy as a long-term objective. For short term purposes, South Africa must review the labour law fair dismissal principle in light of dismissals

¹²⁸⁹ To name a few, see the reasoning in *Garrity v. New Jersey* 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lachance v. Erickson*, 118 S.Ct. 753, 139 L.Ed.2d 695; *Bryson v. United States*, 396 U.S. 64; *U.S. v. Wong*, 431 U.S. 174; *U.S. v. Dunnigan*, 507 U.S. 87; *Hale v. Henkel*, 201 U.S. 43; *Baxter v. Palmigiano*, 425 U.S. 308.

based on criminal misconducts and come up with a new law that accommodates the right against self-incrimination.

There is also a need to research on dismissal and misconduct in order to establish theories that underly these two interrelated concepts. It has been established in this research that misconducts are of a different species. Without much research to interpret misconducts, it becomes difficult to easily identify different types of misconducts and differentiate them. Due to this lacuna in research, it is challenging to come up with justiciable approaches in dealing with dismissals based on different species of misconducts.

There is a need for more research entailing a comparative study on the legality of employers' investigative procedures and disciplinary hearing processes with specific reference to dismissal of employees based on criminal misconducts in South Africa. South Africa must be compared with other African states as well as European states. African states and European states comparative study may serve as pioneer to this study because these states share basic human rights principles. Both African and European states whose common law employment law foundations are similar may avail research areas that could give answers to lacunas in their respective employment laws. It is as well important to do such a study on African states, especially commonwealth states whose common law is of the same foundations as the identified European states. This research can be possible especially because South Africa and other African states respect human rights that are also respected in other European states. It is such availability of human rights in European states that helped with further developments of employment law from unfairness to the required fairness.

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